

~~ORIGINAL~~

No. 12627

Docketed

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In the  
**United States Court of Appeals**  
For the Ninth Circuit

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**Park-In Theatres, Inc.**  
plaintiff-appellant  
vs.

**Seth D. Perkins, George E. Mitzel, La Vere Co. (a  
corporation) and Drive-In Theatres of America (a  
corporation)**  
defendant-appellees

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Appeal from the  
United States District Court  
for the Southern District of California  
Central Division

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**Appellant's Brief**

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# Jurisdictional Statement

## District Court's Jurisdiction

The case comes before this Court on plaintiff's appeal from the District Court's summary judgment (Rp 140) of patent-invalidity (dated April 13, 1950) dismissing a patent-infringement complaint (Rp 2).<sup>1</sup>

Each of the defendants is admittedly (Rpp 2-3 & 30) a citizen of California and *inhabitant* of the District.

The District Court had jurisdiction over the subject-matter, under 35 U.S.C. 67 and under 28 U.S.C. 371.<sup>2</sup>

The District Court had jurisdiction over the defendants under 28 U.S.C. 109<sup>3</sup> effective on August 27, 1948 (when the Complaint at bar was filed).

## This Court's Jurisdiction

This Court has jurisdiction of the Appeal under 28 U.S.C. 291.

Plaintiff-appellant filed its Notice of Appeal (Rp 143) to this Court on May 11, 1950; within 30 days of the entry of the aforesaid final judgment and decree. Hence the appeal was timely.

## Statement of the Case

### Patent-in-suit was not before the District Court

The patent-in-suit was not included in the original record as sent up by the Clerk of the District Court nor in the printed Transcript of Record on appeal, because the record in the Court below (upon which the summary judgment and decree was based) did not include the patent-in-suit. However, for this Court's convenience, three copies of plaintiff's patent-in-suit, No. 1,909,537, are submitted herewith, so that this Court may examine the patent-in-suit.

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<sup>1</sup> this, and other page-references throughout this brief, refer to the pages of the *printed* Transcript of Record filed in this Court, except where otherwise indicated

<sup>2</sup> since superseded by like Section 1338(a) of Title 28 of the United States Code, effective September 1, 1948

<sup>3</sup> since superseded by like Section 1400(b) of Title 28 of the United States Code, effective September 1, 1948

The claims-in-issue are also reproduced in *Appendix B* hereto;—accompanied by fourteen (14) footnotes to the 14 claim-elements or claim-features;—showing the concordance between the various claim-elements or claim-features and the specification & drawings of the patent-in-suit, and accompanied by a *Tabulation of these Footnotes in relation to each of the claims-in-issue* (*Appendix B* being paginated with consecutive numbers, starting with 1, bearing the suffix “b”;—i.e. 1b, 2b, 3b etc).

### **The drive-in theatre of the patent-in-suit**

The drive-in theatre of the patent in suit consists, inter alia, of an elevated screen and a successive series of arcuate *depressed* driveways and arcuate rows of car-aiming ramps (also called “stallways”) alternating with each other (in front of the screen);—the car-aiming ramps being so *backwardly* inclined (that is, with the front of the car-aiming ramp higher than the rear thereof) and being so arranged in relation to the intervening driveways that the cars may be driven from the driveways onto the car-aiming ramps, thereby tilting the car at an angle to aim it at the screen, with this car-aiming angle variable or adjustable for different heights of windshields and car-seats and for the different sizes of their occupants, by moving the car slightly forward or rearward on the inclined car-aiming ramp, thereby to adjust the car-aiming angle so that the vertical angle-of-vision of the car occupants will register with and encompass the vertical dimension of the screen with the lower sight-line clearing the roofs of the cars on the car-aiming ramps ahead;—each driveway being depressed below the front of the car-aiming ramp behind it, so that cars can drive in and out without passing through the line-of-vision of the car-occupants on the car-aiming ramps, and with successively rearward car-aiming ramps being successively higher in general elevation but having successively lesser angles of inclination, and electrical sound-reproducing means disposed in operative relation to the car-aiming ramps.

In *Park-In Theatres Inc. vs. M. A. Rogers et al*, 130 *F.2d* 745, this Court briefly described the invention of the patent-in-suit at pages 747 & 746.

### **Pleadings and Proceedings in the District Court**

Because the District Court also awarded \$3,400.00 as attorneys' fees under 35 U.S.C. 70, without defendants ever having made a motion therefor as required by *Rule 7-b(1)* and without any notice of any motion therefor, and without any showing (by affidavit or otherwise) of any unusual circumstances justifying *any* award of attorneys' fees, and because of the unwarranted inclusion, by defendants' counsel, of the wholly unsupported statement in *Finding 11* (Rp 138) that "the action was brought upon surmise and suspicion and plaintiff repeatedly delayed proceedings" (all of which are contrary to the facts shown by the record), we hereinbelow outline the pleadings and proceedings in the District Court in somewhat greater detail than perhaps would otherwise be necessary, and, for the Court's convenience, we have also supplied herewith, as *Appendix A*, a complete chronologic descriptive list of all *Filings and Proceedings in the District Court*, with page-references either to the original type-written Record sent up from the District Court or to the printed *Transcript of Record on appeal*, as to all listed items which were sent up from the District Court (*Appendix A* being paginated with consecutive numbers, starting with 1, bearing the suffix "a";—i.e. 1a, 2a, 3a etc.).

### **Defendants' belated Motion to Dismiss and the grounds thereof**

On December 9, 1949, more than one and a quarter (1¼) years after the Complaint was filed and a year after their Answer thereto was filed, and 8 months after plaintiff filed its Answer (Rpp 75) to defendants' Request for Admission No. 15\*, the defendants filed a Motion to Dismiss (Rpp 75-82), urging the invalidity of the

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\* during which 8-month period defendants did nothing except to ask that the case be *not* set down for trial (see item 40 of Appendix A at page 4a thereof)

patent in suit and the dismissal of the Complaint upon the following three grounds:

**Ground 1 of defendants' Motion to Dismiss was that**

- 1 "The patent in suit has been held invalid by the **U. S. Court of Appeals for the First Circuit** in *Park-In Theatres Inc. vs. Loew's Drive-In Theatres, Inc.*, 174 F.2d 547 . . . and although the plaintiff . . . applied for a writ of certiorari to the Supreme Court of the United States, certiorari was denied. . . . The patent in suit is **therefore** invalid. . . . Since the patent in suit is invalid and it is impossible to find infringement of an invalid patent, there is no basis for the present suit and it should be dismissed." (Rpp 78-9)

Not having even attempted to bring before the District Court the Record in the *Park-In vs. Loew's* case, nor even suggested in its motion or supporting affidavit what was contained in such Record, defendants' *Ground 1* must have been predicated on one of two theories, namely,

- 1) that the First Circuit's decision had held the patent invalid for lack of invention *on its face* (without reliance upon any prior-art or external evidence of any kind),

or

- 2) that the First Circuit's decision was one *in rem* or having the force of *res judicata*.

**Ground 2 of defendants' Motion to Dismiss was that**

- 2 ". . . the **Court of Appeals** did not specifically refer to prior-patents in support of its holding of invalidity. The record in the instant case refers to prior patents which support **this decision** and renders a holding of invalidity inescapable" (Rpp 80-81);—

defendant's Motion to Dismiss asking the Court to take judicial notice of the Coliseum in Rome and of Soldiers' Field in Chicago (Rp. 81) and citing Lempert patent 1,304,532 (Rp 164) issued in 1884, McKay patent 778,325 (Rp 182) issued



in 1904 and Hale patent 800,100 (Rp 194) issued in 1905 and Keefe patent 1,238,151 (Rp 224) issued in 1917.

*Ground 2* of defendants' motion appears to have been that if *ground 1* were found untenable then the Court is invited to look at some prior-patents and structures, seemingly on the theory that such prior-patents and structures would "support this decision" of the First Circuit. Defendants must no doubt have felt the need for such additional prior-art to "*support this decision*" because they recognized that

1) if the First Circuit's decision was based upon non-invention *on the face of the patent*, then it is in conflict with this Court's decision in *Park-In vs. Rogers, supra*, and the District Court then erred in not following this Circuit (as pointed out under *Argument-Points 4 & 6, infra*),

*while*

2) if defendants' *ground 1* and the lower Court's decision are predicated upon the theory that the First Circuit's decision was one *in rem* or had the force of *res judicata*, then *ground 1* was untenable and the lower Court's decision reversible for that reason (as pointed out in *Argument-Point 3, infra*).

**Ground 3 of defendants' Motion was that**

3 " . . . plaintiff . . . has admitted facts that now prevent plaintiff from contending that the patent is valid. The admitted facts render **the decision of the Court of Appeals for the First Circuit controlling**" (Rp 82);—

the "admitted facts" being that some of the individual component elements of the drive-in theatre structure (defined by the claims-in-issue) were old more than two years prior to the filing of the application for the patent-in-suit;—there being *no* admission, however, either that *all* the



component claim-elements were old or that the *combination* called for by the claims-in-suit was old prior to such filing date.

*Ground 3* (like *ground 2*) is just another tender of "support" for the First Circuit's decision;—no doubt for the same reasons that such "support" was tendered under *ground 2*.

### **Miketta affidavit in support of Motion to Dismiss**

Defendants' aforesaid Motion to Dismiss was accompanied only by the *opinion*-affidavit of defendants' attorney of record and chief advocate, Mr. Miketta, to the effect that, *in his opinion*, the decision of the Court of Appeals for the First Circuit in *Loew's vs. Park-In, supra*, was correct, in view of the Lempert, McKay and Keefe patents, *supra*, cited by defendants at bar (Rpp 85-7);— *this affidavit being devoid of any statement as to affiant's qualifications as an expert in the art*. This opinion-affidavit further goes on to say that defendants' attorney "has carefully studied the patent in suit . . . and the claims thereof and has made a careful study of prior patents and publications relating to the subject matter of the patent in suit; that the study convincingly shows that patent No. 1,909,537 is invalid for lack of invention and by reason of the fact that it fails to comply with R.S. 4888 (35 U.S.C.A. 33)."

**Defendants' Motions based in reality on First Circuit's decision in Loew's case, as though it was a decision in rem;—with defendants' newly-cited prior-art and their other grounds mere makeweight**

The above-quoted portions (constituting all the relevant parts) of defendants' Motion to Dismiss show, *on their face*, that *each* of the *three grounds* of defendants' motion was bottomed on the First Circuit's decision in the *Loew's case*, and upon defendants' interpretation that the First Circuit did not rely upon *any* prior-art of record for its holding of *non-invention* and that such holding of *non-invention* was, in essence, based merely *on the face of*

the patent-in-suit,<sup>1</sup> and upon defendants' erroneous conception (seemingly adopted by the District Court) that such decision of the First Circuit was a decision *in rem* or having the force of *res judicata*\* (and the reference to prior patents was mere makeweight).

Defendants' aforesaid Motion to Dismiss came on for hearing on December 19, 1949, but defendants, preferring not to rely on their Motion to Dismiss, but instead to expand the basis of their request that patent-in-suit be held invalid, asked and were granted leave to have their Motion to Dismiss "deemed a motion for summary judgment" and requested and were granted leave to file, on or before December 21, 1949, "a supplemental or amended motion for summary judgment" (Rp 88).

### Defendants' belated Motion for Summary Judgment and the grounds thereof

On December 21, 1949, defendants filed their Motion for Summary Judgment (Rpp 89-94) asking for a judgment of patent-invalidity on four (4) grounds:

1 The first ground of defendants' Motion for Summary Judgment is the same as *Ground 1* of defendants' previous Motion to Dismiss, namely, the decision of the First Circuit in *Loew's vs. Park-In, supra*, and the Supreme Court's denial of certiorari in respect thereto (Rp 90).

2 The second ground of defendants' Motion for Summary Judgment is generally the same as *Ground 2* of defendants' Motion to Dismiss; *defendants' Motion for Summary Judgment here citing the 4 patents cited in defendants' earlier Motion to Dismiss and 11 additional patents* (Rpp 90-1).

3 The third ground of defendants' Motion for Summary Judgment is that the patent-in-suit is invalid be-

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<sup>1</sup> wherefore plaintiff-appellant submits that the First Circuit's decision in the *Loew's case* is in conflict with the spirit if not indeed the letter of this Court's decision in the *Rogers case* (130 F.2d 745);—as shown more fully under *Argument-Point 4* hereinbelow

\* as did the lower Court in *Park-In vs. Waters*,—F.2d—; CA-5 (87 USPQ 291), quoted on page 38, *infra*

cause “it fails to define and claim the invention in such full, clear, concise and exact terms as are required by the provision of R.S. 4888 (35 U.S.C.A. 33)” namely, that the patent does not specify or “does not define . . . in feet, inches, yards, meters, degrees or any other unit of measurement”, the various parts of the drive-in theatre “so as to enable any person skilled in the art or science to which it appertains, or with which it is most clearly connected, to make, construct and compound the same” (Rpp 91-92).

4 The fourth ground of defendants’ Motion for Summary Judgment is that the patent is invalid because “at the point where the invention purportedly exists, the patentee uses functional language” (i. e. in the claims), citing General Electric Co. *vs.* Wabash Co., 304 U.S. 364, (Rpp 92-3)

— — — — —  
 The *third* and *fourth* grounds of defendants’ Motion for Summary Judgment were not contained or in any way suggested in defendants’ earlier-filed Motion to Dismiss.

**“Anticipation” not ground of either Motion, and non-invention on face of patent, not ground of either Motion**

It should also be noted that while *Conclusion 5* (Rp 139) and *paragraph 5 of the Judgment* (Rp 141) are “anticipation”, yet *neither* in their belated Motion to Dismiss *nor* in their still later filed Motion for Summary Judgment, did defendants set up as a ground or basis of their motion (or otherwise ever contend) that any prior patent or any other item of prior-art (such as the Coliseum in Rome or the Soldiers’ Field in Chicago or the Encyclopedia Britanica) “*anticipates*” the patent-in-suit, namely, defendants did not contend (in or on either of their aforesaid Motions) that any of these prior patents or publications in and of themselves disclose the drive-in theatre of the patent-in-suit or that any pre-existent or prior-used structure was a drive-in theatre structure like that of the patent-in-suit.

Likewise, neither of defendants' motions included, as a ground thereof, that the patent was invalid for lack of invention *on its face*;—unless such ground was included *inferentially* by reliance upon the First Circuit's decision in *Park-In vs. Loew's, supra*.

On their contention of non-invention or “lack or invention over the prior-art”, defendants merely contended that while *none* of the prior-art patents, publications and devices disclosed (or were like) the drive-in theatre structure of the patent-in-suit, such “prior-art” was nevertheless sufficient to suggest such a drive-in theatre and to teach those skilled in the art how to build a drive-in theatre like that of the patent-in-suit, without such *man-skilled-in-the-art* having to exercise any inventive faculty of his own in order to get from the prior patents and publications (or from the pre-existent structures) both a sufficient suggestion and an adequate teaching of the drive-in theatre of the patent-in-suit.

### **Miketta affidavit in support of Motion for Summary Judgment**

Defendants' Motion for Summary Judgment was accompanied by another affidavit of defendants' attorney and chief advocate, Mr. Miketta, who, *without offering or stating any qualification as an expert in the art*, sets forth his arguments and conclusions, in affidavit form, as to the prior-art and as to the patent-in-suit, as to the pleadings and as to the law relied upon by defendants on the various grounds of their Motion for Summary Judgment (Rpp 95-102).

### **Proceedings underlying the award of attorney's fees, and plaintiff's lack of its day in court in respect to such award**

Defendants did not file *any* written motion or notice of motion as required by Rule 7-b(1) of the Federal Rules of Civil Procedure and did not present any oral motion for an award of attorney's fees under 35 U.S.C. 70. Hence, plaintiff was not apprised of the grounds defendants would



rely upon, in their *Finding 11* (Rp 138),\* as a basis for an award of attorney's fees. Instead, defendants' chief counsel, Mr. Miketta, filed an affidavit (Rp 104) merely saying that he

"has heretofore billed the said defendants, for services and disbursements pertaining to the above action, the sum of \$2,685.70 and, in addition, has rendered services amounting to \$375.00 which are as yet unbilled"

and defendants also filed affidavit of their other attorney, Mr. Ladenberger (Rp 105), merely to the effect that his office

"has already been paid by defendants the sum of \$281.25 in legal fees for services rendered; that since the services rendered which have been paid for, affiant has rendered additional services for defendants including court appearances, conferences with other attorneys of record for the defendants and in the preparation and review of various pleadings and other documents filed in the above-entitled case; that to the date of this affidavit the reasonable value of said services is the sum of \$150.00, and that defendants have been rendered a statement for services in that amount."

The Miketta affidavit and the Ladenberger affidavit neither itemized or showed what specific services were charged for, nor stated that the charges made for services were *reasonable attorneys' fees for such services* or that they were for services *necessary to this suit*.

Not having been apprised, in any way, as to any grounds for the award of any attorney's fees, plaintiff, of course, could not (and hence did not) offer any affidavit or any other showing in opposition to an award of attorney's fees.

There having been no motion for an award of attorney's fees and the matter of the award of attorney's fees not having been noticed for hearing at any time, and there

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\* proposed by defendants' attorney *after* the District Court had made the award (Rp 133)



having been no hearing of any kind upon the matter of the award of attorney's fees, plaintiff was never afforded any opportunity to examine defendants or their attorneys either as to the grounds for an award of attorney's fees or as to the reasonableness of the fees alleged in defendants' aforesaid Miketta affidavit and Ladenberger affidavit (which affidavits did *not* itemize the claimed fees).

**Plaintiff's showing in opposition  
to defendants' Motion for Summary Judgment**

In opposition to defendants' Motion to Dismiss and in opposition to defendants' Motion for Summary Judgment, and in answer to defendants' affidavits filed in support of these motions, plaintiff filed the affidavits of Samuel Herbert Taylor, Jr. (Rpp 106-114) and A. C. Boyle (Rpp 115-128).

**Taylor affidavit,  
in opposition to Motion for Summary Judgment**

This Taylor affidavit (Rpp 106-114) refers to his earlier-filed affidavit (Rp 75) wherein Taylor shows his qualifications as an expert in the art, namely, that he is a graduate of the Engineering School of Pennsylvania State College and a Registered Professional Engineer under the Laws of the State of New Jersey, and that since 1923 and continuously to date he has been employed in the County Engineer's Office of Camden County, New Jersey, and that *since 1938 he has been the County Engineer of Camden County, New Jersey, in charge of civil engineering* (such as the planning and construction of highways, bridges, etc.) and that continuously *since 1933 he has also been engaged in the preparation of working drawings and specifications to be used as a basis for entering into contracts, with building contractors, for the building of drive-in theatres of the patent-in-suit, in various locations, and that he is thoroughly familiar with the building of drive-in theatres of the patent-in-suit and has prepared many such contract-drawings and contract-specifications used in the building of drive-in theatres of the patent-in-suit* (Rpp 75-76).

Taylor also shows in his later-filed affidavit that he is in constant professional contact with engineers and architects, belongs to a number of engineering societies, and *has trained and supervised many other engineers.*

Plaintiff's opposing Taylor affidavit (Rpp 106 et seq) shows that Taylor examined the prior patents and publications relied upon by defendants on their motion for summary judgment, and that none of these patents discloses or suggests a drive-in theatre, much less a drive-in theatre structure like that of the patent-in-suit, and that none of these patents and publications contain any disclosure which would teach a man-skilled-in-the-art how to build a drive-in theatre like that of the patent-in-suit. The Taylor affidavit quotes from the Encyclopedia Britanica item relied on by defendants to show the complete irrelevance of this publication and also pointing out the non-analogous and irrelevant character of the other prior patents most relied on by defendants, and shows the problem inherent in theatres and the manner in which such problem was solved for the first time by the drive-in theatre of the patent-in-suit and shows that such problem is (even to this date) not solved in the conventional motion-picture theatre houses, and that:

“None of the prior-art relied upon by defendants discloses a theatre construction in which a successive series of rearwardly-tilted car-supporting and car-aiming surfaces are provided, separated by driveways wider than these car-supporting surfaces and in which the driveways are substantially depressed below the level of the high front-edge of the car-supporting or car-aiming surface immediately behind it, so that the cars can pass to and fro on the driveway below the lowest line of vision of the occupants in the cars on the car-supporting surface immediately behind the driveway, and in which the successive car-aiming surfaces are successively at a higher elevation in respect to each other.

“No such construction or arrangement is disclosed in any of the prior-art nor have I ever seen any

theatre construction or any other construction in which this arrangement was present prior to the advent of the Hollingshead drive-in theatre.

“I am in constant contact with engineers and belong to a number of engineering societies and have trained and supervised many other engineers both young and of various ages, and in my professional activities for more than 20 years I have also been in constant contact with architects in connection with various professional projects on which I have worked.

“To bring into being the drive-in theatre disclosed in the Hollingshead patent and defined by the claims thereof required the exercise of the inventive faculty and indeed, required the exercise of invention of a high order, at the time when Hollingshead made his invention or as of the filing date of his patent.

“No engineer or architect or any other person skilled in any of the related arts could have brought into being the drive-in theatre disclosed and claimed in the Hollingshead patent merely by applying ordinary mechanical skill to the ‘prior-art.’ Indeed no engineer, architect or other person skilled in any of the related or analogous arts ever conceived or brought into being a drive-in theatre like that disclosed in and defined by the claims of the Hollingshead patent, prior to Hollingshead.” (Rpp 112-114)

**Boyle affidavit and Exhibits,  
in opposition to Motion for Summary Judgment**

Plaintiff’s Boyle affidavit, filed in opposition to defendants’ Motion and in reply to defendants’ moving affidavits, shows that plaintiff’s patent-in-suit resulted in the development of a large *new* industry which would otherwise not have come into being;—the affidavit submitting copies of various articles in trade publications (Plaintiff’s Exhibits 2 to 14, reproduced in the Transcript of Record at Rpp 258-275) showing the *pioneer character* and commercial success of the drive-in theatre of the patent-in-suit and its great contribution to the motion-picture producing and exhibiting industry;—*inter alia*, in

creating new motion-picture patronage which the industry would otherwise not have and in producing large profits for picture-producers and for picture-exhibitors which they otherwise would not have. See *list* of trade-publications on *Appendix*-pages 6a & 7a.

**District Court's memorandum decision  
on motion for summary judgment**

Without any hearing and without rendering any Opinion on defendants' Motion for Summary Judgment, and without the patent-in-suit even being in the record before the Court, the District Court, on March 27, 1950, entered a Memorandum Decision (Rpp 129-30)

- 1) that the patent-in-suit is invalid for the reasons stated in the First Circuit's decision in the *Loew's case*, supra,
- 2) that the patent-in suit is invalid as a matter of law for lack of invention over the prior-art,
- 3) that the patent-in-suit is invalid for failure clearly to define and claim the invention, and
- 4) that the patent-in-suit is invalid because of the use of functional language.

The lower court's Memorandum Decision was silent as to *any* attorney's fees (Rpp 129-130).

**Proceedings resulting in the Findings of Fact and Conclusions of Law and in the award of attorneys' fees, and in the entry of Judgment;—Judgment based on a ground not included in defendants' Motions and not supported by any Finding**

On April 1, 1950, defendants submitted their proposed Findings of Fact 1 to 9, which were wholly silent as to any basis or ground for the award of any attorneys' fees.

On April 6, 1950 plaintiff filed its Objections (Rpp 130-132) to the aforesaid proposed Findings of Fact,

On April 12, 1950 defendants filed a Memorandum suggesting, *for the first time*, additional Findings 10 & 11 (Rp 138);—proposed Finding 10 being merely counsel's argument as to the weight to be given to plaintiff's affida-



vits (Rpp 106-114 and 115-128) filed in opposition to defendants' motion for summary judgment, and proposed Finding 11 being merely counsel's very general conclusions "that the action was brought upon surmise and suspicion and that plaintiff repeatedly delayed the proceedings", *without pointing to any specific fact or making specific reference to the pleadings or proceedings* which might be claimed to support such conclusions of counsel.

On the same day (4-12-50), *without affording plaintiff an opportunity to object to newly-proposed Findings 10 and 11*, the District Court overruled (Rpp 132-133) plaintiff's Objections (Rpp 130-132) to defendants' proposed Findings 1 to 9\* and to defendants' proposed Conclusions of Law, and adopted the same, and also *adopted the so belatedly proposed Findings 10 & 11* (Rp 133) and allowed attorneys' fees in the sum of \$3,400.00 on the basis of the *unitemized* Miketta (Rp 104) and Ladenberger (Rp 105) affidavits;—without plaintiff having been given an opportunity either to refer to the record or to offer evidence in refutation of counsel's general conclusions stated in Finding 11 and without any opportunity to examine the affiants Miketta and Ladenberger as to the facts underlying and as to the itemization of the lump-sum claimed as attorneys' fees or as to the reasonableness of the item-charges included in the lump-sum amount or as to grounds for the allowance of any attorney's fee.

On April 13, 1950 the District Court entered the Summary Judgment and Decree (Rpp 140-142) in the form proposed by defendants' counsel, holding the patent-in-suit invalid upon each of the four grounds of defendants' Motion for Summary Judgment (paragraphs 3, 4, 6 & 7 of the Judgment, at Rpp 141-2), and *also* holding the patent-in-suit invalid upon the *additional* ground set out in paragraph 5 of the Judgment (Rp 141), namely, "anticipation"<sup>2</sup>, which was *not* made a basis or ground

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\* adding only the words

"but claims invention in the combination of the elements. There is no invention in the alleged combination"

to the end of Finding 4 proposed by defendants (Rp 134)

<sup>2</sup>i.e. that some prior patent or publication discloses the drive-in theatre of the patent-in-suit or that some pre-existent or prior-used structure was in fact a drive-in theatre like that of the patent-in-suit



of defendants' Motion for Summary Judgment (Rpp 89-94) or of defendants' antecedent Motion to Dismiss (Rpp 77-85), and which ground is *not* supported by *any* Finding of Fact (Rpp 133-138).

## Questions Presented

**Question 1-a:** Is the patent-in-suit\* invalid for non-invention *on its face*, namely, without reliance upon any prior-art?

as defendants seemingly contend<sup>2</sup> that the First Circuit held in *Loew's vs. Park-In* (174 F.2d 547), and as seemingly held by the District Court in the case at bar in paragraph 1 of its Memorandum Decision (Rp 129) and in paragraph 3 of its Finding of Fact (Rp 134) and in paragraph 3 of its Conclusions of Law (Rp 138) and in paragraph 3 of its Summary Judgment and Decree (Rp 141)

or, conversely

**Question 1-b:** Is the patent-in-suit presumptively valid (with any "reasonable doubt of patentability or invention . . . resolved in favor of the validity of the patent") so that the patent may *not* be declared invalid on a motion for summary judgment, and so that "the patentee has the right to fortify the presumption of validity of the patent by proof of matters tending to show that the conception of the patentee involved invention and utility", as stated by this Court in *Park-In Theatres, Inc. vs. Rogers* (130 F.2d 745)?

*Question 1-a* is raised by Point 1-b of Appellant's Statement of Points under Rule 19(6) and by paragraph 3 of the Judgment, while *Question 1-b* is raised by Point 4 of Appellant's Statement of Points under Rule 19(6) and by paragraph 3 of the Judgment.

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\*namely, claims 2, 4, 5, 6, 10, 15, 16 & 19 in issue;—these claims-in-issue being referred to, throughout this Brief, whenever any reference is made to the validity of the patent-in-suit

<sup>2</sup> in *paragraph 1* of their Motions quoted on pages 4 & 7, *supra*

**Question 2:** Is not the decision of the District Court in the case at bar holding the patent-in-suit invalid for lack of invention on its face, and the decision of the First Circuit in *Loew's vs. Park-In* (174 F.2d 547) upon which such decision of the District Court is bottomed, in direct conflict with the spirit and principle if not indeed the letter of this Court's decision in *Park-In vs. Rogers* (130 F.2d 745)?

*Question 2* is raised by Point 1-a of Appellant's Statement of Points under Rule 19(6) and by paragraph 3 of the Judgment.

**Question 3-a:** Does the decision of patent-invalidity of a Court of Appeals, as to which decision certiorari has been denied, operate *in rem* (or have the effect of *res judicata*) so as to be binding or conclusive upon a District Court in *another* Circuit in a case involving a *different* defendant?

or, conversely,

**Question 3-b:** Is a patentee entitled to obtain an independent adjudication as to the validity of his patent, even though the Court of Appeals for another Circuit has held the patent invalid in a case involving another defendant, in which other case the Supreme Court has denied certiorari?

*Questions 3-a & 3-b* are raised by Points 1-a and 4 of Appellants' Statement of Points under Rule 19(6) and by paragraphs 3 and 4 of the Judgment.

**Question 4:** May the District Court hold the patent-in-suit invalid on a Motion for Summary Judgment and enter summary judgment in favor of movant, upon a ground (i.e. "anticipation") *not* made a ground or basis of the motion (nor urged by affidavit, in brief or on oral argument)?

*Question 4* is raised by Points 3-1 and 4 of Appellant's Statement of Points under Rule 19(6) and by paragraph 5 of the Judgment.

**Question 5:** Is the patent-in-suit invalid as “anticipated” by the prior-art relied on by defendants on their Motion for Summary Judgment, namely, does *any* one item of prior-art (in and of itself) disclose the drive-in theatre of the patent-in-suit?

as seemingly held by the District Court in paragraph 5 of its Conclusions of Law (Rp 139) and in paragraph 5 of its Summary Judgment and Decree (Rp 141), but *not* in its Memorandum Decision (Rp 129) *nor* in its Findings of Fact (Rpp 133-138);—“anticipation” not having been made the basis of defendants’ motions (Rpp 77-85 and 85-94)

*Question 5* is raised by Points 1-b and 3 of Appellant’s Statement of Points under Rule 19(6) and by paragraph 5 of the Judgment.

**Question 6.** Is the patent-in-suit invalid, as a matter of law, for lack of invention over the prior-art, upon the record made on defendants’ Motion for Summary Judgment?

as held or found in paragraph 2 of the District Court’s Memorandum Decision (Rp 129), and in paragraphs 4, 5 and 6 in the District Court’s Findings of Fact (Rpp 134-6), and in paragraph 4 of the District Court’s Conclusions of Law (Rpp 138-9), and in paragraph 4 of the District Court’s Summary Judgment (Rp 141)

*Question 6* is raised by Points 1-b, 3-b, 3-c, 3-d, 3-k and 4 of Appellant’s Statement of Points under Rule 19(6) and by paragraph 4 of the Judgment.

**Question 7:** Should the disputed fact-question of invention (and/or of adequacy of disclosure) affecting validity of a patent, be decided on motion for summary judgment?

*Question 7* is raised by Point 4 of Appellant’s Statement of Points under Rule 19(6) and by the Judgment.

**Question 8:** Should an important patent be struck down on a motion for summary judgment as invalid for lack

of invention solely on the basis of an affidavit of the infringers' attorney not qualified as an expert in the art, giving his interpretation of the prior art (none of which is claimed to anticipate the patent-in-suit), where there is an answering affidavit of a well-qualified expert in the art, taking a diametrically opposite view of the prior art, and where there is another answering affidavit and exhibits showing that the invention of the patent-in-suit is of a pioneer character and created a new, large, profitable and wide-spread industry?

*Question 8* is raised by Points 3-d to 3-h of Appellant's Statement of Points under Rule 19(6) and by the Judgment.

**Question 9:** Is the patent-in-suit invalid as violative of 35 U.S.C. 33, because of the use of allegedly functional language therein or because the specification, drawings and claims thereof do not specify the dimensions of the several parts of the drive-in theatre of the patent-in-suit?

as held or found in paragraph 4 of the District Court's Memorandum Decision (Rp 129), and/or in paragraphs 7, 8 and 9 of the Findings of Fact (Rpp 136-8) and/or in paragraph 7 of the Conclusions of Law (Rp 139) and/or in paragraph 7 of the Summary Judgment (Rp 142)

*Question 9* is raised by Points 1-c, 1-d, 3-e & 3-f of Appellant's Statement of Points under Rule 19(6) and by paragraph 6 of the Judgment.

**Question 10:** Is the patent-in-suit invalid on its face for alleged indefiniteness of its claims, under 35 U.S.C. 33?

as held or found by the District Court in paragraph 3 of its Memorandum Decision (Rp 129) and/or in paragraphs 7, 8 and 9 of the Findings of Fact (Rpp 136-8) and/or in paragraph 6 of the Conclusions of Law (Rp 139) and/or in paragraph 6 of the Summary Judgment (Rp 141)

*Question 10* is raised by Points 1-c, 1-d, 3-e, 3-f & 3-g of Appellant's Statement of Points under Rule 19(6) and by paragraph 7 of the Judgment.



**Question 11:** Does the record before the District Court on defendants' Motion for Summary Judgment so conclusively overcome the legal presumption of validity of the patent-in-suit as to require the District Court to hold or to justify it in holding the patent-in-suit invalid?

without affording plaintiff an opportunity, upon a trial, "*to fortify the presumption of validity of the patent by proof of matters tending to show that the conception of the patentee involved invention and utility*" and without "*the advantage of such additional light as is permissible in a patent case upon the question of invention, priority, etc.*" (*Park-In vs. Rogers 130 F.2d 745; CCA-9*)

*Question 11* is raised by Point 4 of Appellant's Statement of Points under Rule 19(6) and by the Judgment.

**Question 12:** Are the questions of fact raised by defendants' Motion for Summary Judgment so clearly resolved in favor of defendants, *by the record*, as to require the District Court to hold or to justify the District Court in holding the patent-in-suit invalid?

thus denying to plaintiff the right of trial by jury of the fact-questions affecting validity

*Question 12* is raised by the Judgment.

**Question 13:** Does not plaintiff's right of trial by jury in the case at bar, require that the District Court should weigh the evidence and determine the fact-question of *invention over the prior-art* in the same manner and by the same test as it would have to weigh such evidence and determine such fact-question if it refused to allow such fact-question to go to the jury at the conclusion of a trial upon which the sum-total of evidence was merely the evidence now contained in the record made on defendants' motion for summary judgment?

(namely, by the test of whether "reasonable men could differ" on the fact-question of whether it required the exercise of the inventive faculty to bring into being the drive-in theatre structure of the patent-in-suit, in view of the prior art)



*Question 13* is raised by Point 4 of Appellant's Statement of Points under Rule 19(6) and by the Judgment.

**Question 14-a:** Does the record before the District Court on defendants' Motion for Summary Judgment require or justify any award of attorneys' fees to defendants under the provisions of 35 U.S.C. 70?

**Question 14-b:** Has the District Court clearly found and stated the basis upon which attorneys' fees have been awarded, as required, *inter alia*, by this Court's recent decision in *Dubil vs. Rayford Camp & Co.* F.2d ; (CA-9) 87 USPQ 143, 146?

**Question 14-c:** Does the record before the District Court upon defendants' Motion for Summary Judgment establish that the \$3,400.00 awarded as attorneys' fees was "reasonable"?

*Questions 14-a to 14-c* are raised by Points 3-i, 3-o, 3-p & 5 of Appellant's Statement of Points under Rule 19(6) and by paragraph 8 of the Judgment.

### Specifications of Errors Relied Upon

1) The District Court erred in holding the patent-in-suit\* invalid on the basis of the decision of the First Circuit in *Loew's vs. Park-In* (174 F.2d 547);—

as it did in paragraph 1 of its Memorandum Decision (Rp 129) and in paragraph 3 of its Findings of Fact (Rp 134) and, seemingly, in paragraph 3 of its Conclusions of Law (Rp 138) and, seemingly, in paragraph 3 of its Summary Judgment (Rp 3).

2) The District Court erred in holding the patent-in-suit\* invalid for non-invention or lack of invention on the face of the patent, namely, without reliance upon any prior-art,

as it seemingly did in paragraph 1 of its Memorandum Decision (Rp 129) and in paragraph 3 of its Findings of Fact (Rp 134) and in paragraph 3 of its Con-

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\* namely, claims 2, 4, 5, 6, 10, 15, 16 & 19 thereof, in issue

clusions of Law (Rp 138) and in paragraph 3 of its Summary Judgment (Rp 3).

3) The District Court erred in holding the patent-in-suit\* invalid for non-invention or lack of invention over the prior-art,

as it did in paragraph 2 of its Memorandum Decision (Rp 129) and in paragraph 4 of its Conclusions of Law (Rp 138) and in paragraph 4 of its Summary Judgment (Rp 141).

4) The District Court erred in holding the patent in suit\* invalid as "anticipated by prior structures, patents and publications",

as it did in paragraph 5 of its Conclusions of Law (Rp 139) and paragraph 5 of its Summary Judgment (Rp 141).

("anticipation" not having been made a basis of any motion nor of any Finding of Fact.)

5) The District Court erred in its Finding of Fact No. 4 (Rp 134) in saying that

"plaintiff admits . . . that the elements described and claimed in the patent in suit No. 1,909,537 are individually old and were well known more than two years prior to the filing date of the patent in suit",

because, as will be seen from a comparison of plaintiff's responses or answers (Rpp 49-53) to defendants' Requests for Admissions (Rpp 38-48), plaintiff did not admit, but indeed denied, for instance, that the inclined automobile stallways or car-aiming ramps of the patent-in-suit or that the abutments at the front portions of such stallways, were old.

6) The District Court erred in *finding* (in its Finding of Fact No. 4, at Rp 134)

"that the elements described and claimed in the patent in suit No. 1,909,537 are individually old and

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\* namely, claims 2, 4, 5, 6, 10, 15, 16 & 19 thereof, in issue

were well known more than two years prior to the filing date of the patent in suit”

because not all of the individual elements described and claimed in the patent-in-suit were old.

7) The District Court erred in its Finding of Fact No. 5 (Rp 135) that

“more than two years prior to the filing of the patent in suit it was customary to use inclined or sloping floors in theatres”;—

if by such finding the District Court meant to find that the rearwardly inclined car-aiming ramps of the patent-in-suit had any antecedent in the prior-art, because nowhere in any theatre structure of the prior-art of record are the spectator-supporting surfaces rearwardly inclined or indeed inclined at all;—the successive chair-supporting stepped terraces of the prior patents (Rpp 166 & 250) being each individually horizontal and not inclined either forwardly or rearwardly, and, as the record shows, the patent-in-suit is the first to disclose rearwardly inclined stepped spectator-supporting surfaces or indeed any successive series of *stepped* and *inclined* spectator-supporting surfaces.

8) The District Court erred in its Finding of Fact No. 4 (Rp 134) that there is no invention in the combination of elements constituting the drive-in theatre of the patent-in-suit.

9) The District Court erred in its Finding of Fact No. 5 (Rp 135), if such finding was intended as a finding that *the drive-in theatre of the patent-in-suit* is merely

“the adoption of the teachings of the prior-art and normal theatre construction to a theatre wherein spectators sit on seats in an automobile instead of seats directly on the floor or ground”,

and/or if it was intended as a finding that

“it is within the skill of anyone who puts his mind on the problem”

to bring into being *the drive-in theatre of the patent-in-suit*, and/or if it was intended as a finding that *the drive-in theatre of the patent-in-suit* was merely

“the selection and aggroupment of old elements for substantially the same purpose”,

and/or if it was intended as a finding that to bring together the combination of elements constituting *the drive-in theatre of the patent-in-suit*

“would readily occur to anyone skilled in the art of construction without exercise of the faculty of invention”.

10) The District Court erred in its Finding of Fact No 6 (Rp 135), because the very general statements made therein in respect to various items of prior-art are not relevant and are inapplicable to the drive-in theatre of the patent-in-suit;—the elements of the prior-art referred to having an entirely different meaning, significance and relationship than the elements of the drive-in theatre of the patent-in-suit.

11) The District Court erred in its Finding of Fact No. 7 (Rp 136), because claims of the patent-in-suit are sufficiently definite and sufficiently comply with the requirements of 35 USC 33 in respect to claims, because the words and language used in the claims of the patent-in-suit are definite enough to the minds of those skilled in the art, when accorded the meaning given such words and language by the specification and drawings of the patent-in-suit.

12) The District Court erred in its Conclusion No. 7 (Rp 139), because the claims of the patent-in-suit are sufficiently definite and sufficiently conform to the requirements of 35 USC 33, and such claims are not void and invalid on the grounds that functional language has been used therein, nor on the ground that they are indefinite or not conforming to 35 U.S.C. 33.

13) The District Court erred in its Finding of Fact No. 8 (Rp 137), because the patent-in-suit contains an ade-

quate disclosure of the drive-in theatre and how to construct the same, and neither the specification, drawings nor claims of the patent-in-suit are indefinite, because neither the specification, drawings nor claims of a patent need state or show dimensions or actual sizes of the parts.

14) The District Court erred in its Finding of Fact No. 9 (Rp 137), because the language of the claims is adequate and sufficiently definite within the meaning of 35 USC 33, when such claim-language is read in conjunction with the specification and drawings of the patent, namely, when the words and phrases used in the claims are accorded the meaning given them by the specification and drawings of the patent.

15) The District Court erred in paragraph 6 of its Summary Judgment (Rp 141), in adjudging the claims of the patent-in-suit "void and invalid for the reason that they fail to define and claim the purported invention in such full, clear, concise and exact terms as are required by 35 USC 33".

16) The District Court erred in paragraph 7 of its Summary Judgment (Rp 142), in adjudging that the claims of the patent-in-suit "are void and invalid in that functional language has been used and the claims are indefinite and do not conform to the requirements of 35 USC 33".

17) The District Court erred in its Finding of Fact No. 10 (Rp 138), because the affidavits filed by plaintiff in opposition to the Motion for Summary Judgment are not mostly on information and belief but are mostly on personal knowledge and refer entirely to relevant matters and do contradict the inferences and conclusions which defendants and the District Court have drawn from the disclosures of the prior patents.

18) The District Court erred in its Finding of Fact No. 11 (Rp 138), because neither the pleadings, interrogatories, answers thereto, requests for admissions and admissions thereto, nor the objections, motions for extensions



of time nor any other papers on file indicate that the action was brought upon surmise or suspicion or that plaintiff deliberately delayed the proceedings, and because the record before the District Court does not in any way support Finding No. 11.

19) The District Court erred in its Conclusion No. 8 (Rp 139), because infringement was not an issue before the Court.

20) The District Court erred in its Conclusion No. 9 (Rp 139) that the Complaint should be dismissed.

21) The District Court erred in its Conclusion No. 9 (Rp 139) (a) that defendants shall recover from plaintiff their reasonable attorneys' fees and (b) that \$3,400.00 is a reasonable attorneys' fees in this matter.

22) The District Court erred in failing clearly to state (either in its Memorandum, Findings, Conclusions or Judgment) the basis upon which attorneys' fees were awarded, as required, inter alia, by this Court's decision in *Dubil et al vs. Rayford Camp & Co.* F.2d ; 87 USPQ 143, 146 (October 18, 1950).

23) The District Court erred in not according plaintiff an opportunity to inquire into and introduce evidence in respect to propriety of an award of attorneys' fees, per se, and as to the reasonableness of the unitemized lump-sum claimed and awarded.

24) The District Court erred in its Summary Judgment, in dismissing the Complaint with prejudice and in awarding attorneys' fees.

25) The District Court erred in not according plaintiff the right of trial by jury of the fact-questions of (a) invention over the prior-art, and (b) adequacy of disclosure of the patent-in-suit.

26) The District Court erred in deciding disputed fact-questions upon a motion for summary judgment.

## Summary of Argument

### Argument-Point 1: Summary judgment not grantable on disputed facts

1-a: Defendants' motions raised disputed questions of fact going to the validity of patent, and such disputed fact-questions should not be decided on Motion for Summary Judgment, and controverted opinion-affidavit of defendants' attorney can not be the basis of a determination of such disputed fact-questions.

1-b: Summary Judgment should not be granted in a jury case unless all underlying facts necessary to sustain such judgment are undisputed and so inescapably compel the inferences and conclusions necessary to sustain the judgment that it can be foreseen with certainty that a directed verdict in favor of the movant would be inevitable upon a trial and that any testimony of witnesses and/or other evidence which plaintiff might produce upon a trial could not possibly alter the end-result.

1-c: The fact-questions raised by defendants' Motion for Summary Judgment are *not* so clearly resolved in favor of defendants, *by the record*, as to require the Court to hold or justify the Court in holding the patent-in-suit invalid and, on the contrary, are so clearly resolved in favor of plaintiff, *by the record*, as to require the Court to hold the patent-in-suit valid *on the record made on the Motion for Summary Judgment*.

*Frederick Hart & Co. vs. Recordgraph Corp.*, 169

F.2d 580, 581 (CCA 3)

*Bowers vs. E. J. Rose Mfg. Co.*, 149 F.2d 612, 615,

616 (CCA-9)

*E. W. Bliss Co. vs. Cold Metal Process Co.*, 47

F.Supp. 897, 899 (DC ND Ohio)

*Weil vs. N. J. Richman Co.*, 34 F.Supp. 401, 402

(DC SD NY)

*Van Wormer vs. Champion Paper & Fibre Co.*, 28

F.Supp. 813, 815 (DC SD Ohio)

- Refractolite Corp. vs. Prismo Holding Corp.*, 25  
F.Supp. 965 (DC SD NY)  
*Faulkner vs. Gibbs*, 170 F.2d 34, 37 (CA-9)  
*Pointer vs. Six Wheel Corp.*, 177 F.2d 153, 159  
(CA-9)  
*Bischoff vs. Weathered*, 76 U.S. 812, 19 L.Ed. 829,  
830  
*Thomson Spot Welder Co. vs. Ford Motor Co.*, 265  
U.S. 445, 446, 68 L.Ed. 1098, 1100

### Argument-Point 2:

District Court may not hold patent invalid on any of the grounds of defendants' motions, without having such patent before it.

- Park-In Theatres, Inc. vs. Waters et al* F.2d  
(87 USPQ 291, 293) CA-5, decided No-  
vember 14, 1950

### Argument-Point 3:

*Lowe's* decision not *in rem* nor *res judicata*.

Decision of 1st Circuit, in *Loew's vs. Park-In* (174 F.2d 547) holding patent-in-suit invalid, is *not* a decision *in rem* and does *not* have the force of *res judicata*, and denial of certiorari in respect thereto does not imply its approval by the Supreme Court, and plaintiff entitled to trial on the merits in the case at bar against different defendants.

- Triplett vs. Lowell* 297 U.S. 638, 642, 645  
*Maytag Co. vs. Hurley Machine Co.* 307 U.S. 243,  
245  
*Park-In Theatres, Inc. vs. Waters et al*, F.2d  
(87 USPQ 291, 293) CA-5, decided No-  
vember 14, 1950  
*Arnstein vs. Porter* 154 F.2d 464, 475 (CCA 2)  
*Jungersen vs. Ostby and Barton Co.* 335 U.S. 560  
*Mandel Bros. vs. Wallace* 335 U.S. 291  
*United States vs. Carver* 260 U.S. 482, 490; 67  
L.Ed. 361, 364  
*Atlantic Coast Line Railroad Co. vs. Powe* 283 U.S.  
401, 403-4; 75 L.Ed 1142, 1143

**Argument-Point 4:**

Conflict between 1st Circuit and this Court.

First Circuit's decision, *in effect* holding plaintiff's patent-in-suit invalid *on its face* for lack of patentable invention, namely, *without reliance upon any prior art*, is believed to be in conflict with the prior decision of this Court holding same patent presumptively valid and holding that it can not be held invalid for lack of invention on its face on a motion for summary judgment;—and District Court's decision at bar is erroneous in that it follows First Circuit instead of following this Court's earlier decision on same patent.

*Park-In Theatres, Inc. vs. Rogers*, 130 F.2d 745 (CA-9)

*Loew's Drive-In Theatres, Inc. vs. Park-In Theatres, Inc.* 174 F.2d 547 (CA-1)

*Philad vs. Vanatta*, 28 F.Supp. 539, 540 (DC SD Cal), appeal dismissed 109 F.2d 1022 (CA-9)

*Appelton Toy & Furniture Co. vs. Lehman Co.*, 165 F.2d 801, 802 (CA-7)

**Argument-Point 5:**

“Anticipation” not having been made a ground or basis of defendants' motion, summary judgment could not be based upon “anticipation”;—and patent-in-suit *not* “anticipated” by prior art: Rule 7-b(1).

*In re Long Island Properties Inc.*, 125 F.2d 206, 207 (CCA-2)

*Steingut et al vs. National City Bank*, 36 F.Supp. 486, 487 (DC ED NY)

*Advertisers Exchange Inc. vs. Bayless Drug Store, Inc.* 3 F.R.D. 178 (DC NJ)

**Argument-Point 6:**

Patent-in-suit *not* invalid for “non-invention” *on its face* (namely, without reliance upon any prior-art).

*Park-In Theatres, Inc. vs. Rogers*, 130 F.2d 745 (CA-9)

**Argument-Point 7:**

**7-a:** Patent-in-suit not invalid, as a matter of law, for lack of invention over the prior-art, upon the record made on defendants' Motion for Summary Judgment.

*Webster vs. Higgins* 105 U.S. 580

*Payne vs. Williams* 117 F.2d 823 (CA-9)

*Diamond vs. Consolidated* 220 U.S. 428

*Goodyear vs. Ray-O-Vac* 321 U.S. 275

**7-b:** The patent-in-suit is presumptively valid, and defendants have not overcome said presumption in the showing made by them on their Motion for Summary Judgment.

*Park-In Theatres, Inc. vs. Rogers* 130 F.2d 745  
(CCA-9)

**7-c:** The claims of patent-in-suit are for a novel *combination* achieving a new end-result, and such combination is different from and not suggested by the prior-art, and these claims are not invalid in view of prior-art, on the record made on defendants' motion.

*Webster vs. Higgins* 105 U.S. 580

*Pointer vs. Six Wheel Corp.* 177 F.2d 153 (CA-9)

*Atlantic vs. Berry* 106 F.2d 644 (CA-3)

**Argument-Point 8:**

Patent satisfies requirements of 35 U.S.C. 33.

**8-a:** Patent-in-suit contains an adequate disclosure within the purview of 35 U.S.C. 33.

*General Electric vs. Nitro* 166 Fed. 994 (CA-2)

*Suczek vs. General Motors* 35 F.Supp. 806 (Mich.)

*Robertson vs. Klauer* 98 F.2d 150 (CA-8)

*Shull vs. Cavins* 94 F.2d 357 (CA-9)

*Payne vs. Williams* 117 F.2d 823 (CA-9)

*Goodman vs. Hawkinson* 120 F.2d 167 (CA-9)

**8-b:** Claims of patent-in-suit are sufficiently definite within the purview of 35 U.S.C. 33.

*Robertson vs. Klauer* 98 F.2d 150 (CA-8)

*Bradley vs. Great Atlantic* 78 F.Supp. 388 (Mich.)



*Excel vs. Bishop* 167 F.2d 962 (CA-6)  
*Peckat vs. Jacobs* 178 F.2d 794 (CA-7)  
*Faulkner vs. Gibbs* 338 U.S. 267  
*Faulkner vs. Gibbs* 170 F.2d 34 (CA-9)

**Argument-Point 9:**

Attorneys' fees unwarranted by record.

**9-a:** Record before District Court on defendants' Motion for Summary Judgment does not justify any award of attorneys' fees under 35 U.S.C. 70.

*Associated vs. Gits* 182 F.2d 1000 (CA-7)  
*Phillips vs. Esso*—F.Supp.—(85 PQ 128)  
*Hall vs. Keller* 81 F.Supp. 836 (Pa.)  
*Barili vs. Bianchi* 168 F.2d 793 (CA-9)  
*Scott vs. Lasticnit*—F.Supp.—(83 PQ 447)  
*Lincoln vs. Linde* 74 F.Supp. 293  
*Dixie vs. Paper Container* 174 F.2d 834 (CA-7)  
*Sales Affiliates vs. National* 172 F.2d 608 (CA-7)  
*Cowles vs. Frost* 77 F.Supp 124 (N. Y.)  
*National vs. Michigan* 75 F.Supp. 140 (Mich.)  
*Union vs. Superior* 9 F.R.D. 117 (Pa.)

**9-b:** District Court neither found nor stated the basis of its award of attorneys' fees, and failure clearly to find and state the basis of the award of attorneys' fees, *in and of itself*, requires reversal of the award of attorneys' fees.

*Dubil vs. Rayford*—F.2d—; CA-9 (87 PQ 143)  
*Hall vs. Keller* 81 F.Supp. 836 (Pa.)

**9-c:** Record before District Court does not establish that \$3,400.00 awarded as attorneys' fees was *reasonable*.

*Hall vs. Keller* 81 F.Supp. 836 (Pa.)  
*Falkenberg vs. Bernard*—F.Supp.—(85 PQ 127)  
*Excel vs. Bishop* 86 F.Supp. 880  
*Brennan vs. Hawley* 82 PQ 92 (Ill.)  
*Heston vs. Kuhlke* 81 F.Supp. 913 (Ohio)  
*Water Hammer vs. Tower* 7 F.R.D. 620 (Wis.)  
*Juniper vs. Landenberger* 76 PQ 300 (Pa.)

## Argument

**Argument of Point 1: Summary judgment of patent-invalidity “for lack of novelty and invention” or “for lack of invention over the prior-art” (or on any of the other grounds of defendants’ motions) cannot properly be rendered on the basis of the fully controverted opinion-affidavit of defendants’ attorney going to well-pleaded facts**

The Complaint (Rp 3-4) alleges that the drive-in theatre of the patent-in-suit “was entirely unknown and unanticipated in the United States, or elsewhere, prior to the time when R. M. Hollingshead, Jr. invented such drive-in theatre, and such invention by Richard M. Hollingshead, Jr. constituted and now constitutes an original inventive contribution of great value and benefit to the public at large, and the public has recognized the merit of said invention by patronizing, to an ever increasing extent, the drive-in theatres embodying such invention, many of which have been built and constructed and used throughout the United States, solely and directly as a result of said invention having been made by Richard M. Hollingshead, Jr. and having thus been made available to the public.”

Against these well-pleaded facts and the presumption flowing from the issuance of the patent that the drive-in theatre of the patent-in-suit was new, useful and involved invention, defendants tendered nothing but a batch of admittedly non-anticipatory\* prior patents and publications, not one of which even suggests a drive-in theatre, as such structures have come to be known throughout the United States since and as a result of Hollingshead’s first drive-in theatre of the patent-in-suit built in Camden, N. J. in 1933 (Rpp 258, 262, 266, 269, 272 and 273).

This batch of admittedly non-anticipatory (and, we submit, irrelevant) prior patents and publications is attempted to be buttressed only by the opinion-affidavit (Rpp 95-103) of defendants’ attorney who has not stated any qualifications as an expert in the art, setting forth

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his arguments as to the disclosures and significance of the prior-art (and as to the adequacy of the disclosure of the patent-in-suit). This moving opinion-affidavit is fully controverted in all respects by the answering Taylor<sup>2</sup> (Rpp 106-114 & 75) and Boyle<sup>3</sup> (Rpp 115-128) affidavits which compel entirely different findings and conclusions as to the nature, extent and true significance of the admittedly non-anticipatory prior-art disclosures, and which clearly dispute the material fact-issues raised by defendants' motions as to invention over the prior-art (and also as to the adequacy of disclosure of the patent-in-suit<sup>4</sup>) and such fact-issues should be resolved by the court or jury upon a trial and not upon a motion for summary judgment.

Thus, it is well settled that, on motion for summary judgment, the sole purpose of affidavits is to establish *whether* an issue of fact exists and *not* to resolve that issue, if it does exist. As stated in *Frederick Hart & Co. vs. Recordgraph Corp.*, 169 F.2d 580, 581 (CCA 3):

“It is well-settled that on motions to dismiss and for summary judgment, affidavits filed in their support may be considered for the purpose of ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue. An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint. (citing cases)

“It is also well-settled that on a motion to dismiss the complaint must be viewed in the light most favorable to the plaintiff and that the complaint should not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim; further, no matter how likely it may seem that the pleader will be unable to prove his

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<sup>2</sup> see pages 11 to 13, *supra*

<sup>3</sup> see page 13, *supra*

<sup>4</sup> i. e. whether the patent-in-suit contained a disclosure of the drive-in theatre in suit sufficient to enable those skilled in the art to build such drive-in theatres

case, he is entitled, upon averring a claim, to an opportunity to try to prove it. (citing cases)''

The principle applies with even greater force in patent cases. Thus, in *Bowers vs. E. J. Rose Mfg. Co.*, 149 F.2d 612, 615, 616 (CCA-9), this Court had before it a case virtually identical with the case at bar, upon the facts. In the *Bowers* case, the District Court (for the Southern District of California, Central Division) had granted summary judgment holding the patent there in suit invalid;—based, in part, upon the affidavits of defendant and defendant's attorney stating their belief that the patent was invalid. In the *Bowers* case, supra, plaintiff's attorney filed an answering affidavit expressing his contrary opinion as to the prior patents.

In holding that the grant of summary judgment was improper upon these conflicting affidavits, this Court, in the *Bowers* case, supra, stated:

“In part the motion was based on the inferences of fact which the Fischers sought to have the court draw from three affidavits.

“So far as the judgment may have been based upon the conflicting affidavits, we are of the opinion that in a patent case the tender of an affidavit of the opinion of an expert on prior patents, met by a similar opposing affidavit, does not convert it from an ordinary trial upon the testimony of witnesses subject to cross-examination to a trial on affidavits.

“Here the affidavits of fact are so in opposition that there is a ‘genuine issue as to a material fact,’ and hence no warrant for a summary judgment within Rule 56(b) and (c) of the Federal Rules of Civil Procedure.”

As mentioned above and as more fully brought out in the Boyle affidavit (Rpp 120-121) the invention of the patent-in-suit has proven to be of the greatest importance and has, in fact, been the basis for the multi-million-dollar outdoor motion-picture theatre industry.



As stated in *E. W. Bliss Co. vs. Cold Metal Process Co.*, 47 F.Supp. 897, 899 (DC ND Ohio) :

“It seems to be the accepted rule that claims covering important inventions will not be struck down by summary judgment where the parties have not agreed on the facts or have not both moved for summary judgment.”

See, also, to like effect; *Weil vs. Richman Co.*, 34 F.Supp. 401, 402 (DC SD NY); *VanWormer vs. Champion*, 28 F.Supp. 813, 815 (DC SD Ohio); *Refractolite vs. Prismo*, 25 F.Supp. 965 (DC SD NY); *Sarnoff vs. Ciaglia*, 165 F.2d 167 (CA-3); *Doehler vs. U.S.*, 149 F.2d 130, 135 (CA-2) and *Hazeltine vs. G.E.*, 183 F.2d 3 (CA-7).

It is well settled that invention is a question of *fact*. *Faulkner vs. Gibbs*, 170 F.2d 34 (CA-9) *affi'd* 338 U.S. 267 *Pointer vs. Six Wheel Corp.*, 177 F.2d 153 (CA-9)

And where, as here, there was a timely demand for trial by jury, it is the function of the jury, as the sole trier of the facts, to decide that question.

*Bischoff vs. Weathered*, 76 U. S. 812; 19 L.Ed. 829, 830 *Thomson vs. Ford*, 265 U.S. 445, 446

Accordingly, it is clear that the District Court erred in deciding the fact-question of invention\* solely on the basis of the controverted opinion-affidavit of defendants' attorney going to the well pleaded fact-question of invention which should have been resolved by the court or jury upon a full trial wherein all the evidence, *pro* and *con*, on that question should have been considered. Hence, the Judgment should be reversed.

### **Argument of Point 2: Patent can't be held invalid, without the patent being before the Court**

In view of the fact that the patent-in-suit was not before the Court on defendant's Motions, it was manifestly

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\*and/or the *fact-question* of the adequacy of the disclosure (grounds 3 & 4 of the District Court's Memorandum Decision at Rp 129), namely whether the patent-in-suit was sufficient to teach those skilled in the art, how to build drive-in theatres of the patent-in-suit



impossible for the District Court to have made any independent determination of the validity of the patent-in-suit in respect to any of the grounds of defendants' motions. Thus, how could the Court have compared the patent-in-suit with the prior-art either to see if the patent-in-suit was "anticipated" or whether (though unanticipated) it did or did not involve invention over the prior-art, or whether its disclosure was inadequate and/or its claims indefinite? The Court could make no determination of any of these defensive matters.

The District Court seemingly relied solely upon the decision of the First Circuit in the *Loew's case*, as though it were a decision *in rem* or as though it had the force of *res judicata*, as pointed out under *Argument-Point 3* hereinbelow.

That summary judgment of patent-invalidity may not be rendered without patent being before the Court, was decided in *Park-In Theatres Inc. vs. Waters et al.*—F.2d—(87 USPQ 291, 293) CA-5 (decided November 14, 1950):

“. . . the trial Court made no independent determination of the validity of the patent in suit. Such a determination was manifestly not made in ruling upon the motion to dismiss the complaint, for it clearly appears that the provisions and claims of the patent in suit were not before the Court and therefore not available upon motion for adjudication of their validity and effect.”

“We conclude that this case should be remanded to the trial Court for further proceedings to afford opportunity for development of the issues involved.”

It is therefore respectfully submitted that the summary judgment must be reversed for the further reason that in the case at bar (as in the case last above cited) the District Court did not have the patent before it and hence could not make an independent determination of any of the matters tendered by the motions upon which the judgment was entered.

**Argument of Point 3: First Circuit's decision is not one in rem nor one having the force res judicata, and plaintiff entitled to independent trial on fact-question of invention (and on all other fact-questions raised by the defenses relied on)**

It is apparent from the District Court's Memorandum Decision (Rpp 129-30) that defendants' motion for summary judgment was granted primarily (if not, indeed, solely) because of the First Circuit's decision in *Loew's vs. Park-In, supra*. Thus, paragraph (1) of the aforesaid Memorandum Decision states that the "Patent in suit is invalid for the reason stated by the United States Court of Appeals for the First Circuit, 174 F.2d 547".

As more or less subsidiary grounds (if grounds, indeed), the Memorandum Decision also adopts *ground 2* of defendants' Motion to Dismiss and Motion for Summary Judgment (i.e. lack of invention over the prior-art) without referring to any prior-art, and adopts grounds 3 & 4 of defendants' Motion for Summary Judgment (i.e., ground 3: inadequacy of disclosure and ground 4: indefiniteness of claims).

Of course, the Findings of Fact and Conclusions of Law (Rpp 133-140) which were drafted by defendants' counsel and which were adopted substantially verbatim by the District Court, after overruling (Rpp 132-133) plaintiff's several objections thereto (Rpp 130-132), refer to some of the "prior-art" *as though* the District Court had compared these prior patents and publications with the patent-in-suit in deciding that the subject-matter defined by the claims of plaintiff's patent-in-suit did not involve invention over the prior-art.

The Summary Judgment and Decree (Rpp 140-142) was also drafted by defendants' attorney and is open to the same objections.

The simple fact is, however, that, as pointed out above, defendants did not even bother to introduce in evidence\* the patent-in-suit, on or in support of either of their Motions, so that the patent-in-suit was not before

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\* either by filing a copy thereof or by attaching a copy thereof to an affidavit, or otherwise

the District Court for consideration by it in connection with any of the grounds of defendants' Motions, much less for its comparison with the prior-art.

That the District Court erred in refusing to make any independent determination of the fact-questions of invention (and/or of the adequacy of disclosure, etc.) raised by defendants' motion, is clearly established by the controlling authorities.

Thus, in *Triplett vs. Lowell* 297 U.S. 638, 642, 645; 80 L.Ed. 949, 952, 954, the Supreme Court held:

“Neither reason nor authority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the same claims against a different defendant. While the earlier decision may by comity be given great weight in a later litigation and thus persuade the court to render a like decree, it is not *res adjudicata* and may not be pleaded as a defense.

“The court whose jurisdiction is invoked by such a suit *must* determine for itself validity and ownership of the claims asserted, notwithstanding a prior adjudication of invalidity of some of them, unless those issues have become *res adjudicata*, by reason of the fact that both suits are between the same parties or their privies.”

See also to like effect *Maytag Co. vs. Hurley Machine Co.* 307 U.S. 243, 245; 83 L.Ed. 1264, 1265.

In its decision (of November 14, 1950) reversing summary judgment which held the patent here in suit invalid for lack of invention in reliance upon the 1st Circuit's decision in the *Loew's case*, the Court of Appeals for the 5th Circuit, in *Park-In Theatres, Inc. vs. Waters et al.*,—F.2d—(87 USPQ 291, 293) said:

“It is thus clear that the Court of necessity gave to the ruling in the reported case, to all practical effects, the binding force of *res adjudicata*. But that proceeding, involving different defendants, did not have any such controlling force. ‘Neither reason or au-

thority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the same claims against a different defendant. While the earlier decisions may by comity be given great weight in a later litigation and thus persuade the Court to render a like decree, it is not *res adjudicata* and may not be pleaded as a defense.' *Triplett v. Lowell*, 297 U.S. 638, 642."

"We conclude that this case should be remanded to the trial Court for further proceedings to afford opportunity for development of the issues involved."

That a Court should not permit itself to be swayed by a defeat suffered by plaintiff in previous litigation, in the absence of *res judicata*, is well pointed out in *Arnstein vs. Porter* 154 F.2d 464, 475 (CCA 2) wherein the Court, in reversing the District Court's action granting summary judgment in defendant's favor (in a suit for copyright infringement) stated:

" . . . we regard it as entirely improper to give any weight to other actions lost by plaintiff. Although, as stated above, the judge in his opinion, except as to one of the previous actions, did not say that he rested his decision, on those other suits, the language of his final judgment order indicates that he was probably affected by them. If so, he erred. Absent the factors which make up *res judicata* (not present here), each case must stand on its own bottom, subject, of course, to the doctrine of *stare decisis*. Succumbing to the temptation to consider other defeats suffered by a party may lead a Court astray; see, e.g., *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 489; 63 L.Ed 1099, note 1."

Indeed, the principal (though not unfailing) ground for granting certiorari in patent cases, is a conflict between Circuits as to the validity of the patent. See, for example, *Jungersen vs. Ostby and Barton Co.* 335 U.S. 560, and *Mandel Bros. vs. Wallace* 335 U.S. 291.

If the reasoning of the District Court, in the case at bar, were correct, there could never be a conflict of



decisions to justify the grant of certiorari because District Courts in *all* Circuits would be bound to follow the first decision of *any* Court of Appeals.

Of course, the denial of certiorari with respect to the First Circuit's decision in *Loew's vs. Park-In*, did not constitute an affirmance or approval of the Court of Appeals' decision and did not, in any way, add to the force and effect of that decision nor render it conclusive or binding in the case at bar, involving a different defendant *not* in privity with the defendant in the First Circuit;—nor did such denial constitute any implied interpretation as to the meaning or scope of the First Circuit's decision.

Thus, as stated by Mr. Justice Holmes in *United States vs. Carver* 260 U.S. 482, 490; 67 L.Ed 361, 364:

“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”

See also to like effect *Atlantic Coast Line Railroad Co. vs. Powe* 283 U.S. 401, 403-4; 75 L.Ed 1142, 1143.

In conclusion it is therefore respectfully submitted that the foregoing authorities required an independent adjudication of patent-in-suit, by the lower Court, which duty, in the case at bar, was even more obvious and explicit, in view of this Court's prior admonition in *Park-In vs. Rogers, supra*, against holding the patent here in suit invalid on summary judgment.

**Argument of Point 4: Apparent conflict between First Circuit in *Loew's vs. Park-In* and this Court in *Park-In vs. Rogers* and lower court's failure to follow this Court on motion for summary judgment**

In the *Loew's* case, there had been *an extensive trial and record* in the District Court, upon the basis of which the District Court had made its fact-finding that the drive-in theatre structure of the patent-in-suit was unanticipated, was ingenious and involved invention over the prior-art, and concluded that the patent-in-suit was valid (70 F.Supp. 880).

However, the First Circuit's decision does not cite or rely upon a single prior patent, publication or prior-use as supporting its fact-finding or conclusion of non-invention.

In ignoring the prior-art and other evidence offered in the District Court by plaintiff and by defendant, respectively, on the question of invention, the First Circuit seemingly ruled that the Hollingshead patent was invalid for lack of invention, *on its face*, namely, *without reliance upon any prior-art\**.

This was seemingly recognized by defendants' attorney, in his Motion to Dismiss (Rpp 75-82) at bar, wherein he said:

“ . . . the Court of Appeals (for the First Circuit) did not specifically refer to prior-patents in support of its holding of invalidity”,

and wherein defendants' attorney then cited

“prior patents *which support this decision* (of the First Circuit’);—

without as much as saying whether any of the prior patents or prior-art cited by defendants at bar was or was not of record in the *Loew's case*, or what the testimony of the witnesses was in the *Loew's case* in regard to such prior patents and prior-art.

Seemingly in direct conflict with the First Circuit's ruling is the spirit, if not indeed the letter, of the decision of this Court in *Park-In vs. Rogers* (130 F.2d 745) wherein this Court *reversed* and set aside the action of the District Court which had granted summary judgment against the patent, here in suit, on the ground, *inter alia*, that the drive-in theatre structure of the patent-in-suit did not involve invention on its face (and also did not come within a patentable category).

The Transcript of Record in the case of *Park-In vs. Rogers*, Appeal No. 9893, decided by this Court on Sep-

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\* as pointed out on page 4, *supra*, it was apparently defendants' position on *ground 1* of their Motion to Dismiss as well as on *ground 1* of their Motion for Summary Judgment, that the First Circuit's decision did hold the patent-in-suit invalid for lack of invention on its face

tember 14, 1942 (130 F.2d 745) shows that the defendant *Rogers* in that case based his Motion for Summary Judgment upon four grounds, including the ground of want of invention or non-invention *on the face of the patent*. Thus, *Rogers'* Motion for Summary Judgment stated the grounds thereof as follows, as will be seen on page 22 of the Transcript of Record on *Rogers'* Appeal No. 9893:

“That the patent sued on by plaintiff herein is invalid **on its face** for

- (a) Want of patentable subject matter
- (b) Want of patentable combination (aggregation)
- (c) **Want of invention**
- (d) Undue multiplicity of claims.”

In the *Rogers* case, the District Court apparently adopted two of *Rogers'* above-quoted grounds, namely, grounds “a” and “c”, as will be seen both from the District Court’s *Memorandum of Conclusions* on page 37 and from its *Findings of Fact* on page 39 and from its *Conclusion of Law* on page 40 of the aforesaid Transcript of Record on *Rogers'* Appeal No. 9893. Thus, in its Memorandum of Conclusions, filed February 19, 1941, on page 37 of the Transcript of Record on *Rogers'* Appeal No. 9893, the District Court said:

“That said invention does not constitute a manufacture, machine or composition of matter, or any improvement thereof”

“and”

“that the same **does not constitute a patentable improvement** within the meaning of the provisions of Title 35 U.S.C.A. Section 31”;—

these two statements corresponding to parts “a” and “c”, respectively, of *Rogers'* above-quoted grounds of motion.

Thus, in the *Rogers* case, the District Court not only held that the drive-in theatre was not patentable subject matter (namely, that a drive-in theatre was not an *art, manufacture, machine or composition of matter*), but also

expressly held that the drive-in theatre of the patent-in-suit does not constitute a patentable improvement within the meaning of 35 U.S.C. 31, *namely, that it did not involve invention, on its face.*

To like effect was the District Court's Findings of Fact in the *Rogers* case, as appears from page 39 of the aforesaid Transcript of Record on *Rogers'* Appeal No. 9893, paragraph 4, of which the District Court found that "The subject matter of the patent claims in suit does not constitute an art, machine, manufacture, or composition of matter"

or

"any new or useful improvements thereof".

To like effect are the District Court's Conclusions of Law in the *Rogers* case as seen from page 40 of the aforesaid Transcript of Record on *Rogers'* Appeal No. 9893, wherein the District Court said:

"2. The patent in suit, No. 1,909,537, as to claims 1, 2, 5, 9, 10, 11, 12, 13, 14, and 15, is invalid in law because the subject matter thereof does not constitute patentable subject matter within the meaning of the provisions of 35 U.S.C.A. Section 31."

"3. The patent in suit No. 1,909,537, as to claims 1, 2, 5, 9, 10, 11, 12, 13, 14, and 15, is invalid in law because **the subject matter thereof does not constitute a patentable invention** or improvement within the meaning of 35 U.S.C.A. Section 31."

The foregoing was recognized by this Court in its aforesaid decision in the *Rogers* case at 130 F.2d 745, 746, wherein this Court made reference to the fact that *Rogers'* motion for summary judgment *was* based on the ground, inter alia, that "*the patent was void on its face for . . . want of invention . . .*" and to the fact that the District Court "*made findings of fact and found that the patent, as to claims in suit . . . (was not for) any new and useful improvement . . . and dismissed the complaint on the ground that . . . the invention was not a patentable invention or improvement within the meaning of 35 U.S.C.A. § 31, 46 Stat. 376*" (130 F.2d 746).



While of course in the *Rogers* case, this Court could not *affirmatively* hold that the drive-in theatre of the patent-in-suit involved invention, because the prior-art had not been developed nor had plaintiff had an opportunity to introduce evidence in support of the presumptive inventiveness of such drive-in theatre, nevertheless, this Court *did* reverse the District Court's aforesaid findings, conclusions and judgment *in their entirety*, and therefore by necessary implication (if not indeed expressly) this Court held that the Hollingshead patent here in suit could *not* be held invalid for lack of invention on its face on a motion for summary judgment;—this Court saying in the *Rogers* case:

“The issuance of the patent is presumptive evidence of invention and patentability. The presumption is so strong that in the event of a reasonable doubt as to patentability or invention that doubt must be resolved in favor of the validity of the patent. *Mumm vs. Jacob E. Decker & Sons*, 301 U.S. 168, 171, 57 S.Ct. 675, 81 L.Ed. 983. See also *Frank v. Western Electric Co.*, 2 Cir., 24 F.2d 642, 645. The lower court confines its conclusions to the proposition that the theatre was not a patentable subject and, consequently, did not consider the questions of invention, utility, etc. Upon the latter issues the patentee has the right to fortify the presumption of validity of the patent by proof of matters tending to show that the conception of the patentee involved invention and utility.

“The appellee suggests that if the decree of the lower court can be sustained on any ground going to the insufficiency of the complaint the judgment should be affirmed. This position cannot be sustained because neither the court below nor this court had the advantage of such additional light as it is permissible in a patent case upon the questions of invention, priority, etc.” (130 F.2d 747-8)

The foregoing is, we believe, and submit, a clear statement by this Court that the patent-in-suit should



not be declared invalid on a motion for summary judgment and that, instead, it can be held invalid, *if at all*, only following a trial during which both sides are given ample opportunity to adduce evidence on the prior-art and the various facts affecting the question of invention, so that the trier of the facts (here the jury and *not* the District Judge) can reach a considered decision in the light of evidence bearing on the question of invention.

We believe, and submit, that this Court's above-quoted statement that the

“lower Court confines its conclusions to the proposition that the theatre was not a patentable subject and, consequently, did not consider the questions of invention, utility, etc.” (130 F.2d 747-748)

was no doubt intended to indicate that the District Court did not or could not make any real determination of the questions of invention, utility, etc., or that if its Memorandum, Findings and Conclusions were intended as a determination of such questions, it did not *properly* undertake the determination of these questions because of the lack of opportunity for

“proof of matters tending to show that the conception of patentee involved invention and utility” (130 F.2d 748)

and because the District Court

“had (not) the advantage of such additional light as is permissible in a patent case upon the questions of invention, priority, etc.”. (130 F.2d 748)

Therefore we believe and submit that notwithstanding this Court's concluding statement in the *Rogers case*:

“For that reason we reverse the decision without doing more than to hold that the structure in question is within a patentable classification” (130 F.2d 748),

this Court *was* nevertheless (and necessarily) *reversing* the District Court's decision *in all respects*, including that part of the District Court's decision which undertook to

hold the patent-in-suit invalid *for lack of invention on its face*;—and all that this Court meant in the words “without doing more etc.” was that this Court could not *affirmatively* hold the patent valid on the question of invention, for lack of proof *pro* or *con* the question of invention, but that this Court nevertheless deemed the District Court *in error* in having held or undertaken to hold the patent invalid for lack of invention on its face, on a motion for summary judgment.

Hence, there is a seemingly direct conflict between the decision of this Court in the *Rogers* case and the decision of the First Circuit in the *Loew's* case, on the presumptive validity of plaintiff's Hollingshead patent here in suit and upon the propriety of invalidating the patent-in-suit for lack of invention *on its face or without reliance upon any prior art or evidence bearing upon the question of invention*.

We respectfully submit that it was not the function of the District Court to attempt to resolve that conflict.

On the contrary, the District Court should have held that on a motion for summary judgment it was bound by the prior decision of this Court in *Park-In vs. Rogers, supra*, as establishing the law of this Circuit.

In other words, while, under the authorities to be discussed hereinabove under *Argument-Point 3*, a District Court is not precluded from making an independent determination of validity, even though there has already been a ruling on the question in *another* Circuit, the District Court in a given Circuit should (*at least on a motion for summary judgment*) follow a ruling of the Court of Appeals for *that* Circuit on questions of validity, etc.

Indeed, the District Court for the Southern District of California, Central Division, has itself recognized its obligation to follow the decisions of this Court where there are conflicting decisions in other Circuits regarding the same patent. Thus, in *Philad vs. Vanatta*, 28 F.Supp. 539, 540 (DC SD Cal), appeal dismissed 109 F.2d 1022 (CCA 9), the Court stated:

“We regard this . . . decision\* as in conflict with the Johnson decision in the Ninth Circuit Court of Appeals, and of course it is our plain duty to follow the latter.”

See also *Appelton Toy & Furniture Co. vs. Lehman Co.*, 165 F.2d 801, 802 (CCA-7) wherein the Court said: “Our decision . . . became binding upon District Courts *in this circuit* as to subsequent litigation on the same patent . . .”

**Argument of Point 5: “Anticipation” not having been made a ground or basis of defendants’ motion, summary judgment could not be based upon “anticipation”;— and patent-in-suit not “anticipated” by prior art**

The summary judgment from which the present appeal was taken, having been entered upon motion (Rpp 77-85 and 89-94), such motion, and the relief which may properly be granted thereon, is necessarily also governed by Rule 7-b(1) which reads, in part:

“An application to the court for an order shall be by *motion* . . . made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought.”

The above-quoted provision of Rule 7-b required defendants’ Motion to Dismiss (Rpp 77-85) and Motion for Summary Judgment (Rpp 89-94) to state *all* grounds upon which the summary judgment was sought and obtained, including “anticipation” which is the basis of paragraph 5 of the Summary Judgment.

It is well established, by the following authorities on this aspect of Rule 7-b(1), that relief may not be granted upon any ground not set out in the motion therefor.

*In re Long Island Properties Inc.*, 125 F.2d 206, 207 (CCA-2)

*Steingut et al vs. National City Bank*, 36 F.Supp. 486, 487 (DC ED NY)

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\* rendered by a Court located in the Second Circuit

*Advertisers Exchange Inc. vs. Bayless Drug Store, Inc., 3 F.R.D. 178 (DC NJ)*

In the case at bar, neither defendants' Motion to Dismiss nor defendants' Motion for Summary Judgment, sets out or suggests, as a ground or basis for summary judgment, that the drive-in theatre structure of the patent-in-suit was "anticipated" by any item of prior-art relied upon by defendants, namely, that any item of prior-art disclosed the *same* structure or construction as that of the drive-in theatre of the patent-in-suit.

Nevertheless in *Conclusion of Law No. 5* (Rp 139) and in *paragraph 5* of the Summary Judgment (Rp 141), both drafted by defendants' counsel and adopted by the District Court, the Court concludes and adjudges that the patent-in-suit was "anticipated" by some unspecified item or items of prior-art.

Interestingly enough, however, defendants' counsel did not include any "finding of fact" (submitted to the District Court) to the effect that the drive-in theatre of the patent-in-suit was "anticipated" by any (specified or unspecified) item of prior-art. The failure of defendants' counsel to do so was no doubt due to the fact that even defendants' counsel could not pick out any item or items of prior-art on which he was willing to stand as an "anticipation" of the drive-in theatre of the patent-in-suit.

For this reason, the District Court's aforesaid *Conclusion of Law No. 5* and *paragraph No. 5* of its *Summary Judgment* are without support even in the *Findings of Fact*.

It is respectfully submitted that it was error on the part of the District Court to enter Summary Judgment of patent-invalidity on the basis of "anticipation" when such ground was not made the basis of the Motion for such Summary Judgment nor indeed ever urged by defendants in any affidavit or brief or on any oral argument.

Furthermore, it is manifest from an examination of each of the items of "prior-art" relied on by defendants†,

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† see analysis of "prior-art" under following *Argument—Point 7-a* hereinbelow



that the patent-in-suit is not “anticipated”, because there is *not one* item of prior-art the device or structure of which responds to or fully satisfies any claim-in-issue of the patent-in-suit:

“ . . . to ‘anticipate’ an invention, it is necessary that all of the elements of the invention or their equivalents be found in one single description or structure where they do substantially the same work in substantially the same way (citing authorities)”\*

**Argument of Point 6: Patent-in-suit not invalid for “non-invention” on its face (namely, without reliance upon any prior-art)**

In paragraph 3 of its Conclusion of Law (Rp 138) and in paragraph 3 of its Summary Judgment and Decree (Rp 141), the District Court held the patent invalid for “lack of novelty and invention”.

It is not altogether clear just what the above-quoted language of the Conclusions and Judgment was intended to mean, but as this part of the Conclusions and of the Judgment does not refer to the prior-art, it would seem that this was intended to mean “lack of novelty and invention” *on the face of the patent*. Perhaps this part of the Conclusions and Judgment was intended to correspond to paragraph 1 of the Memorandum Decision (Rp 129). See pages 14 & 4, *supra*.

However, this Court has heretofore held in *Park-In vs. Rogers*, *supra*, that the patent here in suit may not be held invalid for lack of invention *on its face*, because “the issuance of the patent is presumptive evidence of invention and patentability” and because this “presumption is so strong that in the event of a reasonable doubt as to patentability or invention, that doubt must be resolved in favor of the validity of the patent” and because upon the fact-question of invention “the patentee has the right to fortify the presumption of validity of the patent by proof of matters tending to show that the conception of the patentee involved invention and utility”, and be-

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\* Walker on Patents (Deller's edition) Volume 1, Section 47, page 255



cause the patentee has the right to have his patent judged, against the defense of non-invention, in "such additional light as is permissible in a patent case upon the questions of invention, priority, etc."

It is therefore respectfully submitted that the patent-in-suit is clearly not invalid *on its face* "for lack of novelty and invention", as stated in the lower Court's *Conclusions and Judgment*.

**Argument of Point 7-a: Patent-in-suit not invalid, as a matter of law, for lack of invention over the prior-art**

While "lack of invention over the prior-art" is the basis of paragraph 2 of the District Court's Memorandum Decision (Rp 129) and of its Conclusion 4 (Rp 138) and of paragraph 4 of its Judgment (Rp 141), yet it is manifest, as pointed out on pages 4 to 7, *supra*, that defendants' motions were bottomed entirely on the First Circuit's decision in *Loew's vs. Park-In* and their reference to the prior-art was mere makeweight, and the District Court manifestly had no opportunity to compare the prior-art with the patent-in-suit.

Nevertheless, because "lack of invention over the prior-art" is a part of the Judgment, we believe we have no alternative also to analyze the "prior-art";—which is done hereinbelow. In this analysis the patents and publications are taken up in the order in which such "prior-art" is referred to in defendants' moving affidavit (Rp 95-103). Nilson, White and Togersen, cited in defendants' motion (Rp 91) were not relied on in their moving affidavit while the Findings placing no reliance upon either the Nilson, White, Freschl, Hinman, Togersen or Geyling patents. Hence a discussion of these six patents is deemed unnecessary, and has been omitted.

**"Prior-art" irrelevant;—does not disclose or suggest a drive-in theatre of any form or construction, much less the specific drive-in theatre structure disclosed and claimed in the patent-in-suit**

An examination of the "prior-art" relied upon by defendants, shows that there is not a single patent or

publication disclosing or suggesting even the bare idea of a number (4, 5, 6, 7 etc.) of successive rows of cars, *one behind the other*, and so disposed in relation to each other that the occupants of all the automobiles could get a full view of the same picture-screen through and within the vertical limitations of the windshield, without obstruction from the cars in viewing-positions ahead or from cars entering and leaving viewing-position. Not a single item of “prior-art” relied upon by defendants suggests an *automobile motion-picture theatre* (irrespective of what its structure might be). Much less does the “prior-art” disclose or suggest the specific structure disclosed and claimed in the patent-in-suit with its successive rows of *back-tilted* car-aiming ramps of successively decreased inclination and increased elevation, *alternating* with intervening *depressed* driveways.

**Lempert’s 1884-patent No.304,532** (Rp 164 et seq) relied on in defendants’ moving affidavit (Rp 97) merely discloses a series of *horizontal* “stepped” seat-receiving terraces, *directly adjoining or contiguous with each other*, in the manner long conventional in ordinary theatre houses;—the small circles in Lempert’s Figures 4 and 5 (from which dotted sight-lines are projected to the edge of the stage-floor) representing the points at which the eyes of the patrons presumably would be located when seated upon the conventional theatre-seats placed on these horizontal terraces, if all patrons were of the same stature.

There is nothing in the Lempert patent remotely suggesting an automobile drive-in theatre, much less one in which inclined car-aiming ramps alternate with depressed driveways substantially below the fronts of the car-aiming ramps flanking the driveways rearwardly thereof, nor does the Lempert patent suggest the idea of variably tilting an automobile by means of the inclined car-aiming ramps, as shown particularly in Figures 7, 8, 3 and 4 of the patent-in-suit.

Plaintiff’s opposing Taylor affidavit points out the problems involved in drive-in theatres and why the

Lempert patent fails to supply or suggest any solution to these problems (Rpp 109-112).

The 1945 issue of the **Encyclopedia Britannica** (Rp 276) relied on in defendants' moving affidavit (Rp 97) merely says that an Amphitheatre is

“a building, primarily for entertainments, in which the seats for the spectators surround the stage or arena. It is differentiated from the stadium by the fact that its shape approximates an ellipse. . . . The early amphitheatres were built of wood and were strictly temporary and it was only in the last century of the Republic that permanent amphitheatres of stone were erected (Pompeii c. 80 B.C.). In Rome an amphitheatre with a stone enclosing wall and wooden seats was built in 29 B.C. by C. Statilius Taurus.”

Plaintiff's opposing Taylor affidavit (Rpp 107-8) shows the complete irrelevance of these ancient amphitheatres, referred to in the *Encyclopedia Britannica*.

**Adams' 1887-patent No.366,290** (Rp 170 et seq) relied on in defendants' moving affidavit (Rp 97) merely discloses tilting sections of the floor of “theatres or halls” by hinging the *front* edge of the floor-section and attaching ropes at intervals to the *rear* edge of the floor-section, which ropes are then hoisted up with worm-and-gear type winches;—the raised edge of Adams' floor-section being moved from its lower position *shown in dotted lines*, to its upper position *shown in solid lines* in Adams' Figure 2 (Rp 170). It is not clear from Adams' disclosure whether the non-tilting horizontal portion of the floor immediately adjoining the rope-supported rear edge of the movable floor-section also moves up and down or whether there are two independent horizontal rear floor-portions, one above the other, adjacent the rope-supported rear edge of the movable floor-section, so that such rope-supported rear edge will be in alignment with the lower horizontal floor-portion when such movable floor-section is lowered, and in alignment with the upper horizontal floor-portion when it is hoisted to its upper position. Moreover, Adams does not disclose what the purpose of

his floor-tilting is or whether seats are or are not intended to be placed upon the tilting floor-sections or whether the tilting floor-sections are intended merely as walking ramps to permit patrons to walk from a lower *horizontal* floor-section to a higher *horizontal* floor-section as shown in Adams' Figure 2.

Manifestly, there is nothing in the Adams patent to suggest an automobile-receiving drive-in theatre, much less a drive-in theatre in which inclined car-aiming ramps alternate with driveways which are depressed below the sight-lines of the car-occupants on the ramps flanking the driveway rearwardly thereof and which permit the tilting of the automobile to variable angles by moving the automobile back or forth slightly, nor does the Adams patent disclose a successive series of such alternating inclined car-aiming ramps and depressed driveways, in which the rearward car-aiming ramps are of gradually lesser inclination and higher elevation. Moreover, Adams' tiltable floor-section is tilted forwardly (for the undisclosed purpose) while the car-aiming ramp of the patent-in-suit are inclined rearwardly.

**Hale's 1905-patent No.800,100** (Rp 194 et seq) relied on in defendants' moving affidavit (Rp 98) discloses nothing more than an

“ . . . illusion amusement device in which a person can be made to feel that he is traveling and seeing the sights of some foreign country or State when in reality the vehicle which he occupies is not moving forward at all.

“The invention consists, broadly, in constructing and mounting a vehicle in such manner that it may be rocked by the operator to give the impression of going around curves and providing said vehicle with means to give the occupants thereof the feeling of moving rapidly over the rails of a track and railway-crossings, in combination with means to throw a moving picture upon a screen in front of the car.” (page 1, lines 13-28 of Hale's specification)

“It has been found by actual operation of this amusement device that the illusion is extremely realistic,



some of the passengers having been known to clutch the arms of their seats in fright at the apparent great speed of the car and the way it swung over to the side as it took the curves.” (lines 105-112 of page 2 of Hale’s specification)

All that Hale discloses is a simulated railway-car mounted on a rocking and tilting mechanism to give the effects referred to above, the car having an inclined floor upon which ordinary car-seats are positioned, with the passenger-supporting surfaces of the seats horizontal.

There is nothing in Hale to suggest the idea or even the possibility of disposing automobiles one behind the other upon successive rearwardly inclined car-aiming ramps alternating with depressed driveways and permitting the individual aiming-adjustment of the car by moving it to and fro slightly.

**Mehling’s 1898-patent No.612,117** (Rp 174 et seq) relied on in defendants’ moving affidavit (Rp 98) discloses nothing more than a sight-seeing bus; with the seats or benches *in the bus* arranged successively higher toward the rear upon successive horizontal “stepped” terraces built into the floor of the bus.

**Harris’ 1906-patent No.810,646** (Rp 204 et seq) relied on in defendants’ moving affidavit (Rp 98) discloses nothing more than the familiar old-fashioned sight-seeing trolley car or “observation trolley car” which, like the sight-seeing bus of Mehling, has the trolley seats successively higher, towards the rear, just like in the ancient theatres, stadiums and amphitheatres still universally used. There is no suggestion in Harris’ patent of any drive-in theatre, much less of any drive-in theatre structure in which rearwardly inclined car-aiming ramps alternate with depressed driveways, nor of the other structural features set forth in the claims of the patent in suit as set out in *Appendix B* hereto.

**Ridgway’s 1906-patent No.836,708** (Rp 224 et seq) relied on in defendants’ moving affidavit (Rp 98) discloses nothing more than an



“amusement device which will give the occupant the sensation of taking a trip in a balloon or flying-machine”

and which

“comprises a suspended car having an open end through which the occupants of the car look outwardly onto a screen on which are portrayed the things to be seen on the proposed trip of the balloon—such as sights, natural clouds, etc.—the car having coacting therewith devices whereby the car may be tipped that the open or outlook end of the car may sweep up and down or laterally with relation to the screen, down as when a city or land was to be viewed and upwardly when supposedly ascending into the clouds in going from one place to another.”

Thus, Ridgway's disclosure is just another *illusion* type of amusement device similar to Hale's above referred to, but Ridgway suspends his illusion device, which is a simulation of a section of a dirigible balloon, while Hale uses a simulated section of a railway-car;—both providing means for rocking and/or swinging the vehicle so as to give the illusion of the motion characteristic of that type of vehicle. There is nothing in Ridgway to suggest the drive-in theatre, much less the structure defined by the claims as set out in *Appendix B* hereto.

**McKay's 1904-patent No.778,325** (Rp 182 et seq) relied on in defendants' moving affidavit (Rp 99) is nothing more than a combination of scenic railway long familiar in amusement parks and the illusion type of amusement device of the Hale patent above referred to. McKay uses a simulated sight-seeing trolley car and considerable trackage and several simulated “stations” at which the trolley-car comes onto a *rocking and rumbling* device similar to Hale's, for rocking and rumbling the wheels so as to give the effect of rapid travel while the car is stationary and while travel-pictures are projected on a screen in front of the *single* sight-seeing trolley-car.

There is no suggestion in McKay of a drive-in theatre,

much less of a drive-in theatre structure such as defined by the claims of the patent-in-suit as set out in *Appendix B* hereto.

**Truchan's 1915-patent No.1,145,946** (Rp 232 et seq) relied on in defendants' moving affidavit (Rp 99) discloses nothing more than a conventional railway car into which a small motion-picture theatre has been built in the manner conventional in motion-picture houses, namely, rows of seats or benches with the successively rearward rows being slightly higher, and a screen at the front and a projection booth at the rear of the seats,

“whereby the monotony of traveling may be relieved by the exhibition of motion pictures viewable by the passengers without leaving their seats”, “to afford amusement and instruction to the passengers, while traveling in the car” (lines 15 to 26 of page 1 of Truchan's specification).

There is nothing in the Truchan patent to suggest a drive-in theatre, much less the specific drive-in theatre structure disclosed in the patent-in-suit and defined by the claims thereof as set out in *Appendix B* hereto.

**Keefe's 1917-patent No.1,238,151** (Rp 244 et seq) relied on in defendants' moving affidavit (Rp 99) is another illusion type of amusement device in which *dummy* automobiles can be pulled by windlass toward a screen

“which produces an imaginary or phantom race, but which due to the arrangement of the apparatus will impart to the occupants of the dummy cars or automobiles an idea that the race is real.” (Lines 19 to 24 of page 1 of Keefe's specification).

There aren't any two dummy cars, one behind the other, in Keefe's disclosure and Keefe does not suggest any drive-in theatre, much less the specific drive-in theatre structure disclosed in the patent-in-suit and set out in the claims thereof as seen from *Appendix B* hereto.

**Plaintiff's Reply Affidavits and Exhibits going to the "prior-art" and Hollingshead's invention over the "prior-art"**

Plaintiff's reply affidavit (Rp 106-114), of its eminently qualified (Rp 75 & 113) expert, points out the complete lack of any disclosure or suggestion in any of the "prior-art" of any drive-in theatre, much less of the specific drive-in theatre structure of the patent-in-suit and that it required the exercise of the inventive faculty to bring into being the drive-in theatre disclosed in the Hollingshead patent and defined by the claims thereof (see quotation on pages 11-13, supra).

Plaintiff's opposing Boyle affidavit (Rpp 115-127) likewise points out that the drive-in theatre structure of the patent-in-suit was entirely new and unknown anywhere and also points out the great benefits which this drive-in theatre structure conferred upon the motion-picture industry as well as upon the public, and to this affidavit are attached certain trade-publications (Rpp 258-274) which give the trade's version of this drive-in theatre invention and its effect on the motion-picture industry.

Goodyear *vs.* Ray-O-Vac, 321 U.S. 275, 279.

**Patent-in-suit is truly a pioneer patent**

On the Record made on defendants' motions, the patent-in-suit is the first patent (or publication) in any country or language disclosing a specific structure constituting (or capable of being used as *automobile motion-picture theatre*, and indeed it is the first patent or publication even suggesting the idea of a motion-picture theatre (indoor or outdoor) in which the patrons would enter the theatre in their own automobiles and view the entire performance from the seats of their own automobiles, through the windshields thereof, and finally leave the theatre without ever having to get out of their automobiles.

Much less is there any disclosure or suggestion, in any or all of the prior art, of an *automobile motion-picture theatre* of the specific structure disclosed and claimed in the patent-in-suit.

Thus, none of the prior-art discloses or suggests an outdoor automobile motion-picture theatre including successive rows of *backwardly* inclined or *back-tilted* car-aiming ramps (or “stallways”) *alternating* with *depressed* driveways;—all so arranged in relation to each other that cars can be driven in and out without obstructing the view of car-occupants to the rear and so that cars in viewing-position will not obstruct the view of car-occupants to the rear, and so that the angle of inclination of each car can be varied by the driver by moving the car, to and fro, slightly, upon the car-aiming ramp, so as to adjust for the variations in the dimensions of the car and its seats and for the variations in the statures of its occupants.

Defendants have had the benefit not only of their own independent search of the prior-art, through the classified collections of United States and foreign patents and publications in the United States Patent Office and through other classified collections of literature and literature-abstracts which are the customary fields of search, but defendants have also no doubt had the benefit of the many intensive and exhaustive searches made by the leaders of the motion-picture industry have made during the past 17 years;—the patents and publications and other matter found on such searches having been cited as “prior-art” in *Park-In vs. Loew’s*, 70 F.Supp. 880 (CA-1 at 174 F.2d 547) and also in the *answers* filed in many of the other infringement suits brought on the patent here in suit, all of which suits were of course ascertainable by defendants through the “*United States Patents*” section of *Shepard’s Federal Reporter Citations*, and all of which *answers* were hence likewise available to defendants. If after the many intensive and exhaustive searches of prior-art by a powerful and widespread industry which has capitalized upon the invention of the patent here in suit and has reaped its abundant fruits for 17 years, neither the defendants at bar nor the defendants in any other suits could find a single patent, publication or prior-use disclosing, constituting or suggesting *any automobile motion-picture theatre*, of what-



ever type or construction, *much less* the specific construction or structure of the drive-in theatre in the patent-in-suit, it is fair to say that the patent-in-suit is truly a pioneer patent.

### Findings relative to prior-art untenable

A full and complete answer to the counsel-drafted Findings is that, despite the fact that stadia and theatres and the like had been in operation for many years, no one had thought of the novel construction of the patent-in-suit until Hollingshead made his invention. Thus, defendants rely on patents granted as early as 1884 as showing indoor theatre structures with terraced floors and arcuate rows of seats. Automobiles have likewise been known for over 60 years and, in fact, defendants rely upon the Mehling patent (Rp 174-176) granted in 1904 as showing a self-propelled vehicle of the automobile type. Seating arrangements for viewing motion pictures projected on a screen are likewise a half-century or more old and defendants rely on patents, granted as early as 1904, as showing various structures of this type.

The Court can take judicial notice of the fact that the mass-production of automobiles began more than thirty years ago and that for many years prior to the filing date of the patent-in-suit there were millions of automobiles on the roads.

If, as counsel-drafted *Finding 5* suggests, it was an obvious and simple matter for anyone to design the drive-in theatre of the patent-in-suit, in view of the ancient and still conventional theatre and stadia structures, why was it that no one ever thought of or suggested the idea until Hollingshead did so shortly prior to the filing of his patent-application in 1932?

The answer clearly is that the structure of the patent-in-suit was *not* such an obvious change of the prior-art as *Finding 5* would indicate. As stated in *Webster Loom Co. vs. Higgins* 105 U.S. 580 (26 L.Ed. 1177, 1181):

“But it is plain, from the evidence and from the very fact that it was not sooner adopted and used, that it

did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value and to bring it into notice. Who was the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument, that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to anyone, that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.”

See also *Payne Furnace & Supply Co. vs. Williams-Wallace Co.* 117 F.2d 823, 826 (CCA-9).

It is, of course, a simple enough matter to select this, that and the other feature from various prior patents and publications and, *in the light of the teaching of the patent-in-suit*, synthesize them into a hypothetical structure having the features of claimed invention (which so-synthesized hypothetical structure never existed prior to the filing date of the patent-in-suit). It is, however, well settled that such a *synthesis* from elements (lifted out of a number of prior patents) based on *hindsight*, is improper and cannot be relied on for the purpose of anticipating the patent-in-suit or for the purpose of a finding of “lack of invention over the prior-art”, particularly where, as here, the patent-in-suit was a pioneer one which led to the establishment of a great new industry.

As stated in *Diamond Rubber Co. vs. Consolidated Rubber Tire Co.* 220 U.S. 428, 55 L.Ed. 527, 531-2:

“Many things, and the patent law abounds in illustrations, seem obvious after they have been done, and, ‘in the light of the accomplished result,’ it is often a matter of wonder how they so long ‘eluded the search of the discoverer and set at defiance the speculations of inventive genius.’ (citing authorities) Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skilful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration.” See also the cases discussed hereinbelow at pages 64 & 65.

We submit, furthermore, that the District Court has not made any proper *Finding of Fact* that the patent-in-suit is invalid as anticipated by, or lacking invention over, any *particular* prior patent or any *particular* combination of prior patents.

Instead, the counsel-drafted Findings of Fact simply follow the opinion of the First Circuit’s decision in *Loew’s vs. Park-In, supra*, on the defense of “lack of invention”;—with the very general references to the prior-art interspersed therethrough, to “support this decision” (Rp 81, lines 2 & 3), being mere makeweight.

**Structure of patent-in-suit was deemed by the industry to be NOT obvious from the generally-known prior theatre, auditorium and stadium structures**

The unobviousness of the drive-in theatre structure of the patent-in-suit is further evidenced by plaintiff’s Exhibit 15 (Rp 275) discussed in plaintiff’s answering affidavit (Rp 126-7) which shows that as late as 1937, some 4 years after Hollingshead had built in Camden, N. J. the first of his drive-in theatres, and long after such

drive-in theatre had come to the attention of the public and the industry, experienced motion-picture exhibitors and theatre-owners still had the problem of overcoming the general skepticism of the public, as to how the occupants of each automobile could have full visibility of the screen from the front and rear seats of the automobile, without their views being obstructed by the cars ahead and by the cars moving (in and out) in front of them, and that the practical men of the motion-picture exhibition industry as late as 1937 thought it necessary to give a diagrammatic picture of the way the structure of the drive-in theatre of the patent-in-suit operates, directly upon the front cover of their program books or pamphlets, as shown in plaintiff's Exhibit 15 (Rp 275). Thus, in the judgment of those actually engaged in the industry, it was not obvious to the public as late as 1937\* just how there could be a structure, or what kind of a structure could have been invented, to make for a practical automobile drive-in theatre, and the people actually engaged in the industry deemed it necessary to hand out printed instruction sheets (plaintiff's Exhibit 15) to explain the structure of the drive-in theatre of the patent-in-suit.

How in the face of all this can it be said that the drive-in theatre of the patent-in-suit became obvious from the wholly unrelated ancient structures, publications and patents?

*A fortiori*, the fact-questions raised by defendants' motion for summary judgment are not so clearly resolved, by the record, in favor of the movant, as to have required the District Court to hold or to have justified the District Court in holding the patent-in-suit invalid on the motion.

On the contrary these fact-questions are so clearly resolved in favor of plaintiff, *by the record*, as to require the Court to hold the patent-in-suit valid *on the record made on the motion for summary judgment*. This is not to say that defendants may not, upon the trial, adduce additional evidence not now of record which may be more

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\* *after* Hollingshead's Camden drive-in theatre had been in operation for 4 years and *after* similar drive-in theatres had been built under the patent-in-suit in California.



favorable to defendants than is the evidence now of record. Nor is it necessary to forecast what such evidence might be or whether it will be strong enough to invalidate the patent-in-suit for non-invention. It is sufficient to say that *insofar as the present record is concerned* the patent-in-suit is clearly valid against the defense of "lack of novelty or invention" or "lack of invention over the prior art" or "anticipation".

**Argument of Point 7-b: Defendants' showing made on motion, does not overcome legal presumption of invention**

It is respectfully submitted that neither the prior-art nor the controverted opinion-affidavit of defendants' attorney is sufficient to overcome the strong legal presumption, inherent in the grant of the patent-in-suit, that the subject matter thereof involved invention over the prior-art and was patentable.

The arguments of the defendants' attorney, set out in affidavit form in support of a motion for summary judgment, are refuted not only by plaintiff's opposing affidavits, but also by the irrelevant character of the prior-art and by the view which those skilled in the industry have taken of the invention of the patent-in-suit as shown in plaintiff's Exhibits 2 to 15, discussed above.

Hence, as the legal presumption of invention and patentability has by no means been overcome by the showing made by defendants on their motions, the Judgment below should be reversed for that reason, among others. *Park-In vs. Rogers*, 130 F.2d 745 (CA-9).

**Argument of Point 7-c: Claims to combination valid**

Finding 4 (Rp 134) includes the statement that plaintiff has admitted each of the individual elements of the patent claims to be old and that the District Court so finds. Paragraph 4 also states that plaintiff does not contend that there is invention in any single element of the claims but claims invention in the combination. Paragraph 4 then concludes with the statement that "There is no invention in the alleged combination."

Plaintiff has never admitted that *all* of the elements included in the claims of the patent-in-suit are individually old.\*

Moreover, plaintiff's position has been that the claims of the patent-in-suit are to the combination of elements and features (which constituted the *first* drive-in theatre structure ever known). These claims are valid since the claimed combination was *not* fairly suggested by the prior art and performs a new and different function. They are valid even if all of the individual elements or features making up the combination should themselves be old and found separately in various prior patents.

That invention can reside in a combination of individually old elements or features has long been established as a fundamental principle of patent law, as evidenced by the quotation from *Webster Loom Co. vs. Higgins* 105 U.S. 580; 26 L.Ed. 1177, 1181, as set forth at page \_\_\_\_\_, supra.

Among the more recent decisions on the point is that of this Court in *Pointer vs. Six Wheel Corp.* 177 F.2d 153, 160-1, certiorari denied 339 U.S. 911 (CA-9), wherein it was held:

“By the same token, invention cannot be defeated merely by showing that, in one form or another, each element was known or used before. (citing many cases).”

“The question is: Did anyone before think of combining them in this manner in order to achieve the particular unitary result,—a new function? *If not, there is invention.* (citing cases)”

“At times, the result is accomplished by means which seem simple afterward. But, although the improvement be slight, there is invention, unless the means were plainly indicated by the prior art. (citing many cases)”.

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\* for instance, *back-tilted* car-aiming ramps, *depressed* driveways, and gradual decrease of inclination and increase of elevation of successive ramps, were *not* admitted to be old and were in fact new, as was the combination new

Among the cases cited in the *Pointer* opinion, *supra*, is *Atlantic Refining Co. vs. James B. Berry Sons Co.* 106 F.2d 644, 650 (CCA 3) wherein it was held:

“The defense offered is a mosaic defense and as was said by his court in *Craft-Stone, Inc. v. Zenitherm Co., Inc.*, 3 Cir., 22 F.2d 401, 402, ‘The patentee invented a new and useful product, and it is not permissible for an infringer to go to the prior art and defeat the patent by selecting the various elements of the patentee’s process from different patents, bring them together, and say that this aggregation anticipates. Knowledge after the event is always easy, and problems once solved present no difficulties.’ ”

It is apparent that none of the prior patents or publications relied on by defendants and cited in the *Findings of Fact* (Rpp 135-136) shows or suggests the combination of elements making up the novel outdoor motion-picture theatre for automobiles, as defined by the claims of plaintiff’s patent-in-suit (See *Appendix B*, hereto).

### **Argument of Point 8-a: Patent contains adequate disclosure**

The District Court’s Memorandum Decision includes statements (Rp 129) to the effect that the patent-in-suit is invalid because its claims are indefinite and because functional language has been used in the patent-in-suit. Similar statements are contained in the *Findings and Conclusions* (Rp 136-138 & 139) and *Summary Judgment* (Rp 141-142).

The sole bases for these statements are the arguments of defendants’ attorney (Rp 102-3) contained in his opinion-affidavit (Rp 95-103) to the effect that the various parts or elements constituting the drive-in theatre structure of the patent-in-suit are not *dimensioned*, that is, the patent-in-suit does not specify “in feet, inches, yards, meters, degrees, or any other unit of measurement” the size of the various elements of the structure:—defendants’ attorney *concluding*, in the Motion (Rp 92) that

“As a result the patent does not actually disclose or teach the invention, in its claims, so as to ‘enable any person skilled in the art or science to which it appur-tains, or with which it is most nearly connected, to make, construct, compound, and use the same’.”

and *concluding* in his affidavit (Rp 103)

“That as a result, *the claims* of the patent in suit do not teach how a successful drive-in theatre can be constructed and therefore such claims are invalid since they do not conform to the statutory requirements.”

It is submitted that the aforesaid arguments of defendants’ counsel, as well as the *Conclusions* based thereon, are erroneous upon the facts and under the controlling authorities.

The patent-in-suit specifies (page 2, lines 45-47) the dimension of the car-aiming ramps or stallways (15 or 16 feet) and of the intervening depressed driveways (approximately 35 feet). Figures 1, 2 and 3 show that the first set of these (15’ to 16’) car-aiming ramps or stallways 14 may be more or less twelve car-lengths from the screen 12, or at such distance from the screen that the vertical field of vision of the car-occupants (through and as limited by the windshield) encompasses the vertical dimension of the screen when the car is disposed on a car-aiming ramp in the first row, as indicated in Figures 3 & 4 of the drawings of the patent. On successively rearward rows of car-aiming ramps this vertical field of vision is maintained, as indicated in Figures 3 & 4 and as pointed out in the specification and some of the claims, by decreasing the angle and increasing the elevation of the car-aiming ramps†.

The drawings, particularly Figures 3 and 4, show that the angle of inclination or *back-tilt* of the car-aiming ramps or stallways 14 and the size and height (above ground) of the screen 12 are such that the vertical angle-of-vision 22, indicated in Figures 3 and 4, encompasses the vertical dimension of the screen, with the bottom sight-

† see concordance *Notes 13 & 14* in *Appendix B* (facing page 1b)



line of the angle-of-vision 22 higher than the top of the car on the ramp ahead. The angle-of-vision 22 can be used for determining the angle of back-tilt of the car-aiming ramps 14, the distance of the first row of such car-aiming ramps from the screen and of the size and height of the screen, in accordance with the drawings and specifications of the patent.

One set of *fixed* numerical values for any of these angles or dimensions would be misleading because, for instance, if the vertical dimension of automobile windshields is reduced, these angles and dimensions are necessarily changed correspondingly. Likewise, if it is desired to use a larger screen, the first row of car-aiming ramps 14 would have to be moved back somewhat so that the vertical angle-of-vision 22 (determined by the vertical dimension of the windshield and the distance of the car-seats from the windshield) will encompass the vertical dimension of such larger screen.

Indeed, any attempt to express these relationships in exact mathematical units would have led to the impossible situation of having thousands and thousands of different values, depending upon the particular size of the theatre and the terrain upon which it is to be built, the individual dimensions of the particular vintage, makes and models of automobiles, and the like.

A similar situation was considered in the case of *General Electric vs. Nitro Tungsten Lamp Co.* 266 Fed. 994, 1000 (CCA-2), wherein the Court stated:

“On the present facts, it is clear that it was (1) impossible to define the parts of Langmuir’s lamp in millimeters or other dimensional units; and (2) no such effort was necessary to instruct the skilled man how to make the lamp of the patent.

“It was impossible to give exact measurements, because the economic object of the lamp was to diminish the wattage per candle, and dimensions must be proportioned to the designed wattage; i. e., substantially to the size of the lamp—something to be worked out according to rules presumably long familiar to a competent electrical engineer. It was un-

necessary to do more than state the limits of invention in terms of result, because the results desired are not functional, and do indicate limits in terms of lamp life and candle power which are likewise presumably quite familiar to any competent electrician. When a claim defines achievement in words no broader than the disclosure, and in phrases which, as interpreted by competent workers in the art, tell one how to do what the patentee did, it can rarely be called indefinite.”

Also pertinent is the decision in *Suczek vs. General Motors Corp.* 35 F.Supp. 806, 809 (DC ED Mich), affirmed 132 F.2d 371 (CCA 6), wherein the Court stated:

“The patent in suit is lacking in any disclosure as to the specific angle at which the levers or their axes are placed; so whatever may be said against the Holle disclosure in that respect may also be said against the Suczek patent in suit. An applicant for a patent need not describe all the arrangements that may go into his structure. He must, however, disclose what his invention is and then he may leave some of the details for good mechanics to supply.

“Holle said he could arrange the levers at angles other than right angles. The plaintiff contends that the things which it was necessary to do in order to make it work were not obvious, and that the ordinary skilled mechanic would have made an unworkable wheel suspension. The way I interpret the situation, however, is that when Holle said he could arrange his arms at angles other than at right angles to the car, the ordinary mechanic, skilled in the art, could have done it at the time Suczek applied for his patent. We know today from defendant’s cars that such a thing is operative.”

And, as stated in *H. H. Robertson Co. vs. Klauer Mfg. Co.* 98 F.2d 150, 153 (CCA 8):

“Here the space is hardly capable of mathematical determination and definition since that space is

largely dependent upon the relativity of the eduction pipe, the storm band and the cap and such relativity must be applied to ventilators of varying sizes.”

Finding 7 criticizes claims 5 and 6 as not specifying that the “angle with respect to the screen” is a vertical one as specified in claims 2 and 4 and as stated in the specification (see page 2, lines 30-41 of the patent).

However, the “angle” referred to in claims 5 and 6 is shown throughout the specification and drawing to be a vertical one. It is, of course, well settled that the claims of a patent must be construed in the light of the specification and drawings and that a claim cannot be held invalid for lack of definiteness if it is apparent from the specification and/or drawings just what is meant by the claim-language.

A case directly in point is the decision of this Court in *Shull Perforating Co. vs. Cavins* 94 F.2d 357, 364 (CCA-9), wherein it was stated:

“The appellant also contends that the claims 18 and 24 of the patent in suit are invalid because of the too great generality of the claims in the clauses thereof relating to delayed action. It is contended that neither the means of securing the delay nor the extent of the delay desired or secured are clearly stated in the claims; that said claims merely cover ‘means for effecting a delayed movement of the valve away from its seat’ (claim 18), and ‘automatic means for effecting delayed movement of the valve,’ etc. (claim 24). It is claimed that the words ‘delayed movement’ are too general to comply with the requirements of the statute with reference to the issuance of patents.”

“The patentee is entitled to have the claims of the patent construed with reference to the drawings and specifications. Where the means referred to in claims are clearly shown in the description of the patent, this description is sufficient to cover the means thus disclosed and its mechanical equivalents. (citing

cases). Furthermore, the term 'delayed movement,' while not defined with exactitude in the patent, is clarified by the drawings and also by the purpose sought to be achieved by the delayed movement as declared in the patent description."

In *Payne Furnace & Supply Co. vs. Williams-Wallace Co.* 117 F.2d 823, 825-6 (CCA-9), this Court stated:

"Nor do the claims specifically describe, although they suggest, the manner of assembling the sections together to form a flue pipe. The claims of a patent are to be understood and interpreted in the light of its specifications. *Schriber-Schroth Company v. Cleveland Trust Co.*, December 9, 1940, 61 S.Ct. 235, 85 L.Ed. ; *Smith v. Snow et al.*, 294 U.S. 1, 55 S.Ct. 279, 79 L.Ed. 721; *Jewell Filter Company v. Jackson*, 8 Cir., 140 F. 340, 344.

"Stadtfeld's improvement occurred within the confines of an ancient art. Its importance and wide commercial adoption is powerful evidence of invention as contrasted with the exercise of mere mechanical ingenuity. . . . The patent is entitled to the presumption of validity; and the citations to the prior art fail to overcome the presumption."

See also to like effect *Goodman vs. Paul E. Hawkinson Co.* 120 F.2d 167, 171 (CCA-9).

There is nothing in the record in the case at bar to show that those skilled in the art could not build Hollingshead's drive-in theatres merely on the basis of the teaching contained in the patent-in-suit.

The opinion-affidavit of defendants' counsel (Rp 95-103) can, of course, not be sufficient to overcome the strong legal presumption that the patent fulfills all the requirements of the statute, including adequacy of disclosure (*Park-In vs. Rogers*, supra).

Moreover, defendants' aforesaid moving affidavit is fully controverted by the opposing affidavit (Rp 106 et seq) of plaintiff's well-qualified expert.



Notwithstanding the fact that hundreds of drive-in theatres of the patent-in-suit have been built throughout the United States (some by defendants), defendants' moving affidavit is entirely silent on just what (if any) additional "know-how" was in fact supplied by others in the building of these drive-in theatres, over and above the teachings of the patent-in-suit, and whether such additional "know-how" reflected the exercise of the inventive faculty or merely ordinary mechanical skill (in putting into operation the presumptively adequate teaching of the patent-in-suit).

It is significant to note that in *Loew's vs. Park-In, supra*, the First Circuit *rejected* the argument that the patent-in-suit was invalid for lack of definiteness;—that Court conceding:

“that Hollingshead's patent contains an adequate 'teaching' of his open-air drive-in theatre structure, and this in spite of the fact that he gives no mathematical formula for pre-determining the verticle angle of his automobile stallways relative to the height of the screen; typical claims providing only that the stalls be at a vertical angle with respect to the stage such as will produce a clear angle of vision from the seat of the automobile, through the windshield thereof to the stage, free of obstruction from the automobiles ahead of it.” (174 F.2d 551)

Thus, the District Court, in the case at bar, has\* gone even farther than the First Circuit did in *Loew's vs. Park-In, supra*.

Inasmuch as there had never been any prior ruling of any court adjudging the patent-in-suit invalid for indefiniteness, the District Court clearly erred in deciding this issue upon summary judgment instead of leaving it to be decided upon the trial, when all the underlying facts could be fully developed.

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\* perhaps as the result of relying too much upon defendants' attorneys for the draft of the *Findings of Fact* and *Conclusions of Law* and *Summary Judgment and Decree*;—coupled with the lack of opportunity to examine the patent-in-suit

**Argument of Point 8-b: Claims Not Functional**

The District Court's adoption of the argument of defendants' attorney that the claims are objectionable as being "functional" was likewise erroneous. Thus, the basis for this objection is generally the same as that of the objection of "indefiniteness" discussed above, namely the fact that the claims do not specify dimensions in terms of feet, inches, degrees of arc, etc., which will give the clear angle of vision specified by the claims. The claims make it clear that the car-aiming ramp or stallways are at a vertical angle with respect to the screen so as to give an upward or *backward* tilt to the automobile. Most of the claims are specifically limited to the use of these car-aiming ramps or stallways, and are manifestly unobjectionable from the standpoint of being merely "functional". Claims 16 and 19, while not referring to these stallways in the same language, are, nevertheless, explicit in referring to "inclined means for supporting automobiles", which the specification and drawings show to be back-tilted car-aiming ramps.

The phrase "inclined means for supporting" is not objectionable, since, as stated in *H. H. Robertson Co. vs. Klauer Mfg Co.*, supra:

"A limited use of terms of effect or result, which accurately define the essential qualities of a product to one skilled in the art, may in some instances be permissible *and even desirable.*" *General Elec. Co. v. Wabash Appliance Corp.*, 58 S.Ct. 899, 903, 82 L.Ed. , May 16, 1938."

As stated in *Bradley vs. Great Atlantic & Pacific Tea Co.* 78 F.Supp. 388, 393 (DC ED Mich), affirmed 179 F.2d 636 (CA 6):

"The plaintiff does use the word 'means' in its patent claims but we do not understand the Halliburton case\* to infer that from that date on the use of that particular word is taboo in all patent claims. Many patents in the past and certainly many since the date

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\* Halliburton vs. Walker, 329 U.S. 1, 8-9

of the Halliburton decision have referred to the 'means' by which the patented article is supposed to function. We think that the objection of the Supreme Court to the legality of the patent in the Halliburton case was chiefly because not one of the claims rested or even suggested the physical structure of the acoustical resonator."

See also to like effect *Excel vs. Bishop* 167 F.2d 962, 966 (CCA 6) and *Charles Peckat Mfg. Co. vs. Jacobs* 178 F.2d 794, 799 (CA 7) and

Indeed, the Supreme Court itself has recognized that the *Halliburton* case to be limited to the peculiar facts there under consideration, because in *Faulkner vs. Gibbs* 338 U.S. 267, it granted certiorari because of an alleged conflict between the decision of this Court (reported at 170 F.2d 34) and the *Halliburton* decision. In sustaining this Court's holding of validity and infringement, the Supreme Court stated:

"The record, briefs and arguments of counsel lead us to the view that Halliburton, supra, is inapposite. We there held the patent invalid because its language was too broad at the precise point of novelty. In the instant case, the patent has been sustained because of the fact of *combination* rather than the novelty of any particular element."

In *Faulkner vs. Gibbs* 170 F.2d 34 (CA-9), the defendant had raised the same objections which are raised by defendants at bar, namely that

"the claims do not particularly describe and distinctly claim as invention the part, improvement or combination claimed as invention but merely represent an attempt to patent a function or result . . .",

because of the use of the word "means".

In sustaining the validity of the patent, this Court *rejected* these defenses of indefiniteness and functionality in the *Faulkner* case, and we submit that that decision should be followed herein and the District Court's decision should be reversed and set aside.

### Argument of Point 9-a: The Record does not justify award of any attorneys' fees

In its Memorandum Decision (Rpp 129-130) the District Court made no reference to *any* award of attorneys' fees. It was only in *Finding 11*, belatedly proposed by defendants and adopted by the Court without affording plaintiff any opportunity to object thereto, as pointed out at page 9, 14 & 15, *supra*, that defendants tendered as a part of the *Findings of Fact* the statement "that the action was brought upon surmise and suspicion and that plaintiff repeatedly delayed the proceedings".

However, not only was this statement so injected into the *Findings* without support in the record, but, indeed, Judge Yankwich more than a year earlier had denied\* defendants' Motion to Strike & Dismiss based on their identical contention that the action was brought "on surmise and suspicion and without good grounds"<sup>1</sup> and "that the complaint fails to state a cause of action, etc."<sup>2</sup> Hence, if anything, it was *the law of the case* that the complaint was *not* filed on surmise and suspicion and that the complaint *did* state a good cause of action.

It is likewise manifest from the *Filings and Proceedings in the District Court*, set out in *Appendix A*, that defendants did not delay the proceedings.

Authority for award of attorney's fee in patent cases is found in 35 U.S.C. 70, as amended August 1, 1946:

"The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.";

making the award of attorney's fees discretionary, and not mandatory.

The great weight of authority is to the effect that the award of damages under this statute should be the excep-

\* see item 18 on page 2a of *Appendix A*

<sup>1</sup> lines 4 and 5 of page 3 of defendants' Motion to Strike filed November 3, 1948 (not reproduced in the Transcript of Record, and being item 15 of the Filings and Proceedings in the District Court, *Appendix A*)

<sup>2</sup> lines 7 and 8 of page 5 of defendants' Motion to Dismiss filed November 11, 1948 (not reproduced in the Transcript of Record, and being item 15 of the Filings and Proceedings in the District Court, *Appendix A*)



tion rather than the rule, and that, in the absence of unusual circumstances evidencing bad faith on the part of the losing party, *no* part of the attorney's fees of the prevailing party should be assessed against him.

Particularly is this true where the losing party in the District Court is the plaintiff-patentee and where the sole ground for the decision is the alleged invalidity of the patent-in-suit.

**Associated Plastics Companies, Inc. vs. Gits Molding Corp.**, 182 F.2d 1000, 1006 (CA-7, decided June 19, 1950)

**Phillips vs. Esso**, —F.Supp.—; DC Md. (85 USPQ 128, 133-4)

**Hall vs. Keller**, 81 F.Supp. 836-7 (DC MD Pa):

“Granting the harrassment and that the defendant suffered serious damages, we believe this character of claim

would not be classified and indemnified under the provisions for the payment by the losing party of the attorney's fees of the prevailing party in this case.”

It is clear that the present action was instituted in good faith and under a *prima facie* claim of right reinforced not only by the presumption of validity inherent in the grant of the patent (see *Barili vs. Bianchi*, 168 F.2d 793, 803; CA-9) but also by the earlier favorable decision of this Court in *Park-In vs. Rogers*, *supra*, which, as pointed out hereinabove, established the law of this Circuit.

To like effect are each of the following cases:

*Scott vs. Lasticnit*—F.Supp.—Mass (83 USPQ 447)

*Lincoln vs. Linde* 74 F.Supp. 293, 294 (DC ND Ohio)

*Dixie vs. Paper Container* 174 F.2d 834, 836-7 (CA-7)

*Sales Affiliates vs. National* 172 F.2d 608, 613 (CA-7)

*Cowles vs. Frost* 77 F.Supp. 124, 131 (DC SD NY),  
affirmed 174 F.2d 868 (CA-2)

*National vs. Michigan* 75 F.Supp. 140, 142 (DC WD Mich)

*Union vs. Superior* 9 F.R.D. 117, 121 (DC WD Pa)

As it is manifest from the Pleadings and Proceedings that the Complaint was filed in good faith and that plaintiff has not delayed the proceedings at all, and as it is *the law of the case* that the Complaint was filed “on surmise and suspicion”, there was no ground whatever for the award of attorneys’ fees, under the weight of judicial authority reflected by the above-cited cases. Therefore, the award of attorneys’ fees should be reversed and set aside.

**Argument of Point 9-b: District Court failed to state basis of award of attorneys’ fees as required by this Court in *Dubil vs. Rayford***

The District Court, in the case at bar, failed to comply with the rule stated by this Court in *Dubil vs. Rayford*, F.2d ; CA-9 (87 USPQ 143, 146) that the District Court must clearly state the basis on which attorneys’ fees are to be awarded, and in the absence of any such statement “it becomes the duty of the reviewing court to set aside the award”.

To like effect is the decision in *Hall vs. Keller*, supra.

In the case at bar, there is no statement by the Court as to any basis or reasons for the award of attorneys’ fees unless it be the statement of defendants’ attorney in his belatedly submitted *Finding 11* “that the action was brought on surmise and suspicion”, a contention which had been rejected by another Judge of the same Court more than a year earlier and as to which defendants made no additional showing since such rejection, or unless it be the equally unsupported contention injected by defendants’ counsel into his belatedly proposed *Finding 11* “that plaintiff repeatedly delayed the proceedings”, which is likewise completely refuted by the *Filings and Proceedings* in this action as shown by *Appendix A*.

Therefore, it is respectfully submitted that the lower Court’s award of attorneys’ fees should be reversed and set aside for failure to comply with the requirement of this Court in *Dubil vs. Rayford*, supra.

**Argument of Point 9-c: Record before District Court does not establish that \$3,400.00, awarded as attorney's fees, was reasonable**

Even if this were a case in which defendants were entitled to an award of attorney's fees under 35 U.S.C. 70, it is submitted that the District Court erred in awarding an excessive amount, and without any showing to support such amount or any amount of that general magnitude.

Thus, the sum of \$3400 included (Rp 139) in the counsel-drafted Findings and Conclusions and Summary Judgment, is based solely upon affidavits of defendants' attorneys merely stating the total amounts billed and to be billed by them.

The only place in which either affidavit states that the charge for services is "reasonable" as required by 35 U.S.C. 70, is the reference to the \$150.00 in the Ladenberger affidavit.

There is no allegation that the \$281.25 paid to Ladenberger was a "reasonable" fee, nor that the \$2685.70 billed or that the \$375.00 to be billed by Mr. Miketta were "reasonable" fees for the services necessarily or actually rendered by him in *connection with the proceedings in the action at bar*.

Thus, defendants' Miketta and Ladenberger affidavits are devoid of any showing from which it could be gleaned whether defendants' attorneys have rendered 20 hours of service or 200 hours of service and whether they billed their time at the rate of \$5.00 an hour or \$100.00 an hour and whether and to what extent the services for which the claimed charges were made were for their work in connection with pleadings, motions and proceedings initiated by defendants which were wholly unnecessary<sup>1</sup> or as to which defendants were unsuccessful<sup>2</sup>.

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<sup>1</sup> for instance, defendants' Interrogatories were clearly unnecessary because they went to matters peculiarly, if not exclusively, within defendants' knowledge, and defendants Answers to the Complaint were unnecessary if their Motion to Dismiss or their Motion for Summary Judgment was sound

<sup>2</sup> for instance, defendants were unsuccessful on their first Motion to Strike and Dismiss the Complaint and for a more Definite Statement, and were also, for the most part, unsuccessful on their Requests for Admissions

Assuming (without suggesting that it is a fact) that Mr. Miketta's services were billed at the rate of \$50.00 an hour, and that defendants were willing to pay at that rate, that would not yet be a sufficient reason to *award* attorney's fees at that rate, because what may be reasonable *and proper* as between attorney and client may *not* be "reasonable" in the eyes of the law in respect to the award of attorney's fees under 35 U.S.C. 70.

Likewise, as virtually all pleadings, motions and proceedings initiated by defendants (other than their Motion for Summary Judgment) and all affidavits, briefs and hearings incident to such motions and proceedings (other than affidavits in support of and in opposition to defendants' Motion for Summary Judgment) were obviously unnecessary if defendants' Motion for Summary Judgment were sound, there should have been an apportionment between the services in connection with defendants' Motion for Summary Judgment, on the one hand, and in connection with all other pleadings, motions and proceedings initiated by defendants, on the other hand, and only the charges incident to the former services should have been awarded.

While for the purposes of this appeal we need not question the fees charged by other attorneys *to their clients*, we most emphatically say that \$3400.00 *far exceeds* any "reasonable attorney's fees" *under 35 U.S.C. 70* in view of the summary disposition of this case;— fees merely for preparing the few sustained requests for admissions, a 6-page Motion for Summary Judgment, a 9-page Affidavit and a 9-page Brief in support thereof and for preparing the Findings, Conclusions and Judgment.

If not more than \$2500.00 was originally considered "reasonable attorney's fees" for a fully tried case as extensive as *Hall vs. Keller*, *supra*, then surely only a small fraction of that amount would be justified in the case at bar in view of the summary disposition of the action at bar.

Even in cases where attorney's fees have been allowed, other Courts have almost invariably reduced the amounts



originally requested and have limited the award to only certain phases or aspects of that particular case.

Thus, in *Falkenberg vs. Bernard Edward Co.* F.Supp. ; DC ND Ill (85 USPQ 127, 128), the Court awarded the successful plaintiff-patentee only half the amount requested as attorney's fees. In the *Falkenberg* case, supra, the District Court had originally held the patent invalid (79 F. Supp. 417), but had been reversed by the Court of Appeals (175 F.2d 427) which held the patent valid and infringed. Upon remand, the District Court stated:

“In the majority of cases where fees have been allowed, the courts have been concerned with actions instituted by plaintiffs purely for the purpose of harassment or with conduct designed to put the opposing party to unconscionable expense during the pendency of the suit. In the instant case the Court is not particularly confronted with these problems. However, it should be remembered that I previously found, in which finding the Court of Appeals concurred, that defendant had been guilty of copying in a most flagrant manner. . . . However, in view of the fact that defendant was not guilty of inequitable conduct during the course of the proceedings before this Court and the Court of Appeals, I feel that sound judicial discretion requires that the sum awarded by reason of defendant's previous conduct be half of the amount requested.”

In other words, even though the infringer had been guilty of flagrant copying such as entitled the plaintiff-patentee to the award of attorney's fees, the Court, in the *Falkenberg* case, supra, *cut the amount in half* because there had been nothing unusual in the prosecution of the suit itself.

See also the following decisions on the matter of the reduction or disallowance of the claimed attorney's fees because of the need for apportionment between various phases or aspects of the case:

*Excel vs. Bishop* 86 F.Supp. 880, 881 (DC ND Ohio)  
*Brennan vs. Hawley* 82 USPQ 92, 95 (DC ND Ill)  
*Heston vs. Kuhlke* 81 F.Supp. 913-916 (DC ND Ohio)  
*Water Hammer vs. Tower* 7 F.R.D. 620, 622 (DC ED Wis)  
*Juniper vs. Landenberger* 76 USPQ 300, 301 (DC ED Pa)

Even if the Miketta and Ladenberger affidavits had specified that all of the charges made by them were reasonable, the Court should still have required a factual showing so that it could exercise its own discretion as to whether the charges were in fact reasonable within the meaning of 35 U.S.C. 70, and the Court's failure to require such a verified constitutes reversible error.

Thus, the District Court was clearly in error in not making an independent determination as to the reasonableness of the fees charged by defendants' attorneys and in simply adopting the unitemized totals billed by defendants' attorneys.

## Conclusion

In conclusion, it is therefore respectfully submitted that the Summary Judgment of the District Court should be reversed and set aside for each of the reasons set out under foregoing *Argument-Points 1 to 9*, inclusive, and that this Court should hold that, *upon the record made on defendants' motions*, the patent-in-suit is *not* invalid on any of the grounds set out either in defendants' Motions or in the Findings, Conclusions or Judgment.

Respectfully submitted,

REGINALD E. CAUGHEY

LYON & LYON

LEONARD L. KALISH

attorneys for plaintiff-appellant.

## Appendix A

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
1	8-27-48	filed: Complaint for patent-infringe- ment.....	2 to 8
2	8-27-48	issued Summons	
3	8-27-48	made JS-5 Report	
4	9-10-48	filed: Summons returned, served	
5	9-21-48	filed: Stipulation and Order (by Judge Yankwich) that defendants have to 10-20-48, to Answer	
6	9-28-48	filed: Interrogatories propounded by defendants.....	3 to 13
7	10- 8-48	issued: preliminary patent report on Complaint	
8	10-13-48	filed: Stipulation and Order (by Judge McCormick), that plaintiff has to and includ- ing 10-18-48 to answer or object to Inter- rogatories heretofore propounded by defend- ants.....	13 & 14
9	10-18-48	filed: Plaintiff's Answers to defendants' Interrogatories.....	14 to 19
10	10-18-48	filed: Interrogatories propounded by plaintiff.....	20 to 23
11	11- 2-48	filed: Answer of defendant Perkins, to plaintiff's Interrogatories.....	23 & 24
12	11- 2-48	filed: Answer of defendant Mitzel, to plaintiff's Interrogatories.....	25
13	11- 2-48	filed: Answer of defendant LaVere, to plaintiff's Interrogatories.....	26 & 27
14	11- 2-48	filed: Answer of defendant Drive-In Theatres of America, to plaintiff's Interroga- tories.....	28 & 29
15	11- 3-48	filed: defendants' Motion, returnable 11-15-48, to strike and dismiss the complaint or for more definite statement	
16	11-15-48	entered: Order (by Judge Yankwich) continuing, to 11-22-48, hearing on defend- ants' Motions to Strike, dismiss and for more definite statement	

## Appendix A (continued)

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
17	11-17-48	filed: plaintiff's Memorandum in opposition to defendants' Motion to Strike, dismiss and for more definite statement	
18	11-22-48	entered: Order (by Judge Yankwich) denying defendants' Motion to Strike, dismiss and for more definite statement, and giving defendants 20 days to answer the complaint	
19	12- 7-48	filed: Answer of defendants.....	30 to 37
20	1-28-49	filed: defendants' Requests for Admissions.....	38 to 48
21	1-28-49	filed: defendants' Exhibits 1 & 2 (accompanying defendants' Requests for Admissions).....	163
22	2-23-49	filed: plaintiff's Response to defendants' Requests 1 to 5, and 8 to 13 and 20 to 24 for Admissions.....	49 to 53
23	2-23-49	filed: plaintiff's Objections to defendants' Requests 6 & 7 and 14 to 19 and 25 to 40.	53 to 58
24	2-23-49	filed: Notice of hearing on 3-7-49 upon plaintiff's Objections to certain of defendants' Request for Admissions and on plaintiff's motion for extension of time to respond to defendants' Requests for Admissions.....	59
25	2-23-49	filed: plaintiff's motion for extension of time to respond to certain of defendants' requests for admissions.....	60 & 61
26	2-23-49	filed: affidavit of Leonard L. Kalish in support of plaintiff's motion for extension of time to respond to certain of defendant's requests for admissions.....	62 to 67
27	2-23-49	filed: affidavit of Willis Warren Smith in support of plaintiff's motion for extension of time to respond to certain of defendants' requests for admissions.....	67 to 71
28	2-23-49	filed: affidavit of Reginald E. Caughey in support of plaintiff's motion for extension of time to respond to certain of defendants' requests for admissions.....	71 to 74



## Appendix A (continued)

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
29	3- 1-49	filed: defendants' memorandum in opposition to plaintiff's motion for extension of time	
30	3- 5-49	filed: plaintiff's Reply to defendants' memorandum in opposition to plaintiff's motion for extension of time	
31	3- 7-49	entered: proceedings (before Judge Harrison) and Order continuing, one week, hearing on plaintiff's Objections filed 2-23-49 to certain of defendants' Requests for Admissions and on plaintiff's motion for extension of time to answer said Requests for Admissions	
32	3-14-49	entered: proceedings (before Judge Cavanah) on plaintiff's motion for extension of time to respond to certain of defendants' Requests for Admissions, heretofore filed, and entered Order granting plaintiff's motion for extension of time	
33	3-14-49	entered: Order (by Judge Cavanah) continuing to 3-21-49, 10 a.m., before Judge Cavanah, hearing upon plaintiff's Objections to certain of defendants' Requests for Admissions	
34	3-14-49	filed: affidavit of C. A. Miketta in support of defendants' memorandum in opposition to plaintiff's motion for extension of time	
35	3-21-49	entered: proceedings, hearing (before Judge Hall) and Order sustaining plaintiff's Objections to defendants' Requests for Admissions Nos. 7, 14, 16 to 19, and 25 to 40, inclusive, and overruling plaintiff's Objections to defendants' Request for Admission No. 15	
36	3-25-49	filed: Order (by Judge Hall) on plaintiff's Objections to defendants' Request for Admissions; sustaining plaintiff's Objections to Requests Nos. 7, 14 and 16 to 19 and 25 to 40, inclusive, and overruling plaintiff's Objections to defendants' Request No. 15, and giving plaintiff 20 days to respond to Request No. 15.....	(page 101 of original typewritten Record)

† ( 4- 9-49 *Decision in Loew's vs. Park-In; 174 F.2d 547, handed down by First Circuit*)

† this is not a docket-entry, but our own insertion, to show the chronologic relationship between the First Circuit's decision and the filings and proceedings in the case at bar

## Appendix A (continued)

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
37	4-13-49	filed: plaintiff's Answer to defendants' Request for Admission No. 15 (this response being the affidavit of Samuel Herbert Taylor, Jr. dated 4-5-49, which affidavit was adopted by plaintiff as its Answer to Request No. 15).	75 to 77
†	(10-10-49)	<i>Certiorari denied in Park-In vs. Loew's;—338 U.S. 822</i> )	
38	11- 3-49	entered: Order (by Judge McCormick) transferring cause to Judge Carter for all further proceedings. Counsel notified	
39	11-21-49	placed cause on setting calendar of 12-5-49 and mailed notices	
†	(12- 5-49)	<i>Rehearing, on certiorari, denied in Park-In vs. Loew's;—338 U.S. 896</i> )	
40	12- 5-49	entered: proceedings (before Judge Carter) and Order, on defendants' request, continuing case to 12-19-49 for trial-setting	
41	12- 9-49	filed: defendants' Notice of Motion to Dismiss, returnable 12-19-49	
42	12- 9-49	filed: defendants' Motion for Dismissal, with points and authorities.....	77 to 85
43	12- 9-49	filed: affidavit of C. A. Miketta filed by defendants.....	85 to 87
44	12-14-49	filed: plaintiff's Memorandum of authorities in opposition to defendants' Motion for Dismissal	
45	12-19-49	entered: proceedings and hearing (before Judge Carter) on defendants' Motion for Dismissal, and entered stipulation and order that defendants' Motion for Dismissal may be deemed to be a motion for summary judgment on the question of validity, and that defendants shall have to and including 12-21-49 to file an amended or supplemental motion, and that motion stand submitted on the record together with briefs and affidavits to be filed; plaintiff to have to and including 1-6-50 to file its documents, and defendants to have to and including 1-16-50 to file reply documents.	88 & 89

† this is not a docket-entry, but our own insertion, to show the chronologic relationship between the denial of certiorari in the case of *Park-In vs. Loew's* and the filings and proceedings in the case at bar

## Appendix A (continued)

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
46	12-22-49	filed: defendants' Motion for Summary Judgment.....	89 to 94
47	12-22-49	filed: defendants' Exhibits A1, A2, A3 & A4, accompanying their Motion for Summary Judgment, these Exhibits being copies of pages 847 & 848 of Volume I and of Plates I and II, opposite pages 272 & 273 of Volume XXI of the Fourteenth (1945) Edition of the Encyclopedia Britannica.....	276 to 282
		Exh A1: Encyclopedia Britannica, p. 847..	276
		Exh A2: Encyclopedia Britannica, p. 848..	278
		Exh A3: Encyclopedia Britannica, Plate I.	280
		Exh A4: Encyclopedia Britannica, Plate II.	282
48	12-22-49	filed: copies of 15 prior patents, as defendants' Exhibits B-1 to B-15, inclusive, accompanying their Motion for Summary Judgment.....	164 to 254
		Exh B- 1: Lempert 304,532 of 1884....	164 et seq
		Exh B- 2: Adams 366,290 of 1887....	170 et seq
		Exh B- 3: Mehling 612,117 of 1898....	174 et seq
		Exh B- 4: Nilson 760,236 of 1904....	178 et seq
		Exh B- 5: McKay 778,325 of 1904....	182 et seq
		Exh B- 6: Hale 800,100 of 1905....	194 et seq
		Exh B- 7: Harris 810,646 of 1906....	204 et seq
		Exh B- 8: White 828,791 of 1906....	212 et seq
		Exh B- 9: Ridgway 836,708 of 1906....	224 et seq
		Exh B-10: Freschl 897,282 of 1908....	228 et seq
		Exh B-11: Truchan 1,145,946 of 1915....	232 et seq
		Exh B-12: Hinman 1,164,520 fo 1915....	240 et seq
		Exh B-13: Keefe 1,238,151 of 1917....	244 et seq
		Exh B-14: Togersen 1,397,064 of 1921....	250 et seq
		Exh B-15: Geyling 1,798,078 of 1931....	254 et seq
49	12-22-49	filed: affidavit of C. A. Miketta in Support of defendants' Motion for Summary Judgment.....	95 to 103

## Appendix A (continued)

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
50	1- 4-50	filed: defendants' points and authorities in Support of their Motion for Summary Judgment	
51	1- 4-50	entered: Order on oral stipulation allowing plaintiff to and including 1-28-50 to file answer and points and authorities and affidavits in opposition to defendants' Motion for Summary Judgment, and that defendants have to and including 2-8-50 to file reply documents	
52	1-31-50	filed: defendants' memorandum in support of Motion for Summary Judgment	
53	1-31-50	filed: affidavit of C. A. Miketta that he had theretofore billed defendants \$2,685.70 for services and disbursements pertaining to action and has rendered unbilled services in the amount of \$375.00 . . . . .	104
54	1-31-50	filed: affidavit of Don A. Ladenberger in support of defendants' motion for costs and attorneys' fees, saying that defendants paid affiant \$281.75 in legal fees for services rendered that affiant has rendered unbilled services of the value of \$150.00 . . . . .	105
55	2- 6-50	entered: proceedings and stipulation and order that plaintiff have 10 days in which to serve and file its affidavit in opposition to defendants' Motion for Summary Judgment.	
56	2-16-50	filed: affidavit of Samuel Herbert Taylor, Jr., in opposition to defendants' Motion to Dismiss and in opposition to defendants' Motion for Summary Judgment . . . .	106 to 114
57	2-16-50	filed: affidavit of A. C. Boyle, in opposition to defendants' Motion for Dismissal and in opposition to defendants' Motion for Summary Judgment . . . . .	115 to 128
58	2-16-50	filed: plaintiff's Exhibits 2 to 15, inclusive (accompanying affidavit of C. A. Boyle) . . . . .	258 to 275
		Exh 2: Motion Picture Herald, 7-1-33	
		(pp 15-17 & 42): <i>The Drive-In theatre</i> . .	258 to 261



## Appendix A (continued)

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
58	2-16-50	(continued)	
		Exh 3: Everybody's Weekly, 5-16-48 (p 17):	
		<i>Growth of Drive-In Movies</i> .....	262
		Exh 4: Motion Picture Herald, 7-17-48 (pp 13 & 16):	
		<i>The Roof's the Sky and Sky is Drive-In Limit</i> .....	263 & 264
		Exh 5: Boxoffice, 7-17-48 (p 11): <i>50 Drive- Ins at Pittsburgh, as Outdoor Theatres Boom</i> .....	265
		Exh. 6: Boxoffice, 11-13-48 (p. 25): <i>Drive- Ins up from 100 to 761 in 20-month Build- ing Boom</i> .....	266
		Exh 7: Boxoffice, 6-11-49 (p 12):	
		<i>Drive-Ins Booming</i> .....	267
		Exh 8: Motion Picture Herald, 6-11-49 (p 15): <i>Bigger and Better Drive-Ins Boom</i> .	268
		Exh 9: Time, 6-20-49 (p 84):	
		<i>Cinema section</i> .....	269
		Exh 10: Boxoffice, 7-23-49 (p 42):	
		<i>Rodgers Says Drive-Ins creating New Patrons</i> .....	270
		Exh 11: Independent Film Journal, 7-30-49 (p 10): <i>Drive-Ins Create New Patrons for Motion Pictures</i> .....	271
		Exh 12: The Exhibitor, 8-24-49 (p 5):	
		<i>Speaking of Drive-Ins, Let's Give Proper Credit</i> .....	272
		Exh 13: The New Yorker, 10-1-49 (pp 20 & 21): <i>The Talk of the Town</i> .....	273
		Exh 14: Boxoffice, 10-8-49 (p 10):	
		<i>Drive-In Clearance Rights Placed Before the Court</i> .....	274
		Exh 15: cover of July 1937 program-booklet of Weymouth Drive-In Theatre (Massa- chusetts).....	275

## Appendix A (continued)

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
59	2-23-50	filed: defendants' memorandum in reply to plaintiff's affidavits filed in opposition to defendants' Motion for Summary Judgment	
60	3-27-50	entered: order (Judge Carter) granting defendants' Motion for Summary Judgment;— findings and judgment to be submitted within 10 days	
61	3-27-50	filed: Memorandum Decision (by Judge Carter) granting defendants' Motion for Summary Judgment.....	129 & 130
62	4- 1-50	lodged: defendants' proposed Findings 1 to 9 and proposed Conclusions 1 to 9	
63	4- 1-50	lodged: defendants' proposed summary judgment and decree	
64	4- 6-50	filed: plaintiff's Objections to proposed findings of fact and conclusions of law.....	130 to 132
65	4- 6-50	filed: plaintiff's memorandum in opposition to award of attorney's fees	
66	4-12-50	filed: defendants' memorandum in response to plaintiff's objections to proposed Findings of Fact, Conclusions of Law and Judgment, and suggesting additional Findings 10 & 11	
67	4-12-50	entered: Order (by Judge Carter) overruling plaintiff's objections to the proposed Findings 1 to 9 and to the proposed Conclusions, and adopting additional Findings 10 & 11 suggested by defendants on the same day, and settling form, and directing defendants to prepare revised findings, and allowing attorneys' fees in the sum of \$3400.00.....	132 & 133
68	4-13-50	filed: Findings of Fact and Conclusions of Law.....	133 to 140
69	4-13-50	entered: Summary Judgment and Decree (by Judge Carter) holding patent in suit invalid and dismissing Complaint and awarding attorneys' fees in the sum of \$3400.00....	140 to 142
70	4-14-50	made J.S. 6 report	

## Appendix A (continued)

Item	Date	Filings and Proceedings in District Court	Pages of printed Transcript of Record at which reproduced
71	4-14-50	made final patent report	
72	4-18-50	filed: defendants' memorandum of tax- able costs and disbursements	
73	8-18-50	filed: defendants' notice of taxation of costs	
74	4-20-50	taxed costs in favor of defendants, at \$53.38. No objections. Docketed and en- tered costs	
75	5-11-50	filed: plaintiff's Notice of Appeal.....	143
76	6-16-50	entered: Order (by Judge McCormick) extending to July 20, 1950 the time for docket- ing appeal.....	(page 296 of original typewritten Record)
77	7-11-50	entered: Order (by Judge Carter) ex- tending to August 9, 1950 the time for docketing an appeal.....	(page 297 of original typewritten Record)
78	7-14-50	filed: plaintiff-appellant's Statement of Points under Rule 75-d.....	143 to 148
79	7-14-50	filed: plaintiff-appellant's Designation of Consents of Record on Appeal.....	148 to 151
80	7-20-50	filed: counter-Designation of Record of Appeal, submitted by defendant-appellees....	151 to 153
81	7-27-50	Certificate of the Clerk of the District Court.....	154 & 155

**FOOTNOTES of concordance between  
claim-elements and specification & drawings**

- 1: the screen 12 shown, for instance, in Figures 1, 2, 3 & 4 of the drawings of the patent-in-suit
- 2: that is, there is a stall-way or *ramp* (or a pair of stall-ways or *ramps*) in front of and behind each drive-way (except possibly the front-most drive-way and the rear-most drive-way)
- 3: namely, the drive-ways 15, shown in Figures 1, 2, 3, 4, 5, 6, 7 & 8 of the drawings of the patent-in-suit, which adjoin and merge with the wedge-shaped car-aiming ramps
- 4: that is, tilted *away* from the screen, as illustrated, for instance, in Figures 3 to 8, inclusive, of the patent-in-suit
- 5: the stall-ways have come to be generally referred to (since Hollingshead's invention has gone into general use) as the "car-aiming ramps" or as the "car-tilting ramps" or as the "car-focusing ramps", or just "ramps" for short (see also note 12, below)
- 6: that is, a vertical angle-of-vision bounded by the two lines which extend from the eye of the car-occupant (in the front or back seat) through the lower and upper edges, respectively, of the wind-shield;— which vertical angle-of-vision will embrace the full vertical dimension of the screen
- 7: that is, the automobiles which are either on one of the forward car-aiming *ramps* or on one of the forward (depressed) drive-ways
- 8: the bulkhead 21, illustrated, for instance, in Figures 4 to 8, inclusive, of the drawings of the patent-in-suit
- 9: the projection booth 26, shown schematically or diagrammatically, in Figures 1, 2 & 3 of the drawings of the patent-in-suit
- 10: the sound reproducing means are loud-speakers (lines 71-75 & 78-79 of page 2 of the patent-specification)
- 11: i.e. "distributed at suitable points" (lines 74 & 75 of page 2 of the patent specification) on "said stall-ways" or ramps. One of the several illustrations of such "operative relation", pointed out in the specification of the patent-in-suit, is to have the *loud-speakers* "distributed at suitable points in the field" (lines 74 & 75 of page 2 of the patent-specification) so that the "operative relation to said stall-ways" in claims 5 and 6 is the distribution of the loud-speakers "at suitable points" on "said stall-ways" or car-aiming ramps which are the "suitable points in the field" specified in the parts of the specification above referred to
- 12: the "automobile tilting means" are the inclined or wedge-shaped *ramps* (see note 5, above) on which the car can be longitudinally tilted (see note 6, above) to varying degrees according to the need of and selection by the car-occupant
- 13: the car-aiming *ramps* towards the rear are generally higher than those toward the front, as illustrated, for instance, in Figures 3, 6 & 8 of the drawings of the patent-in-suit
- 14: the car-aiming *ramps* toward the rear have a lesser inclination, while the car-aiming *ramps* toward the front are at a steeper inclination to the horizontal, as illustrated, for instance, in Figures 3, 6 & 8 of the drawings of the patent-in-suit



## Appendix B

### Tabulation of Footnotes to Claim-Elements Showing claim-elements in each claim

Footnotes to claim-elements	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Claim 2:	*	*	*	*	*	*	*							
Claim 4:	*	*	*	*	*	*	*	*						
Claim 5:	*	*	*	*	*	*	*			*	*			
Claim 6:	*	*	*	*	*	*	*	*	*	*	*			
Claim 10:	*	*	*		*	*	*					*		
Claim 15:	*	*	*	*	*								*	*
Claim 16:	*		*	*	*	*	*						*	*
Claim 19:	*	*	*	*	*	*	*						*	*

### Claims of Hollingshead patent, which are in issue

Superior numerals, in text of claims, refer to facing footnotes:

2) An outdoor theater comprising a stage<sup>1</sup>, alternate<sup>2</sup> rows<sup>3</sup> of curvilinear automobile drive-ways<sup>3</sup> and curvilinear and vertically inclined<sup>4</sup> automobile stall-ways<sup>5</sup> arranged in front of the stage<sup>1</sup>, said stall-ways<sup>5</sup> being adapted to receive automobiles disposed adjacent to each other and facing the stage<sup>1</sup>;—said automobile stall-ways<sup>5</sup> being at a vertical angle<sup>4</sup> with respect to the stage<sup>1</sup> such as will produce a clear angle of vision<sup>6</sup> from the seat of the automobile, through the windshield<sup>6</sup> thereof to the stage<sup>1</sup>, free of obstruction from the automobiles ahead<sup>7</sup> of it.

4) An outdoor theater comprising a stage<sup>1</sup>, alternate<sup>2</sup> rows<sup>3</sup> of curvilinear automobile drive-ways<sup>3</sup> and curvilinear and vertically inclined<sup>4</sup> automobile stall-ways<sup>5</sup> arranged in front of the stage<sup>1</sup>, said stall-ways<sup>5</sup> being adapted to receive automobiles disposed adjacent to each other and facing the stage<sup>1</sup>;—said automobile stall-ways<sup>5</sup> being at a vertical angle<sup>4</sup> with respect to the stage<sup>1</sup> such as will produce a clear angle of vision<sup>6</sup> from the seat of the automobile, through the windshield<sup>6</sup> thereof to the stage<sup>1</sup>, free of obstruction from the automobiles ahead<sup>7</sup> of it, and an abutment<sup>8</sup> along the front boundary of each of said stall-ways<sup>5</sup> for limiting the forward position of the automobiles therein.

**Appendix B** (continued)

5) An outdoor theater comprising a screen<sup>1</sup>, alternate<sup>2</sup> rows<sup>3</sup> of automobile drive-ways<sup>3</sup> and vertically inclined<sup>4</sup> automobile stall-ways<sup>5</sup> arranged in front of the screen<sup>1</sup>, said stall-ways<sup>5</sup> being adapted to receive automobiles disposed adjacent to each other and facing the screen<sup>1</sup>;—said automobile stall-ways<sup>5</sup> being at an angle<sup>4</sup> with respect to the screen<sup>1</sup> such as will produce a clear angle of vision<sup>6</sup> from the seat of the automobile, through the windshield<sup>6</sup> thereof to the screen<sup>1</sup>, free of obstruction from the automobiles ahead<sup>7</sup> of it, a motion picture projection booth<sup>9</sup> in operative relation to said screen<sup>1</sup> and electrical sound reproducing means<sup>10</sup> in operative relation<sup>11</sup> to said stall-ways<sup>5</sup>.

6) An outdoor theater comprising a screen<sup>1</sup>, alternate<sup>2</sup> rows<sup>3</sup> of automobile drive-ways<sup>3</sup> and vertically inclined<sup>4</sup> automobile stall-ways<sup>5</sup> arranged in front of the screen<sup>1</sup> said stall-ways<sup>5</sup> being adapted to receive automobiles disposed adjacent to each other and facing the screen<sup>1</sup>;—said automobile stall-ways<sup>5</sup> being at an angle<sup>4</sup> with respect to the screen<sup>1</sup> such as will produce a clear angle of vision<sup>6</sup> from the seat of the automobile, through the windshield<sup>6</sup> thereof to the screen<sup>1</sup>, free of obstruction from the automobiles ahead<sup>7</sup> of it, an abutment<sup>8</sup> along the front boundary of each of said stall-ways<sup>5</sup> for limiting the forward position of the automobiles therein, and a motion picture projection booth<sup>9</sup> in operative relation to said screen<sup>1</sup>, and electrical sound reproducing means<sup>10</sup> in operative relation<sup>11</sup> to said stall-ways<sup>5</sup>.

10) An outdoor theater comprising a stage<sup>1</sup>, alternate<sup>2</sup> rows<sup>3</sup> of automobile drive-ways<sup>3</sup> and automobile stall-ways<sup>5</sup> arranged in front of the stage<sup>1</sup>, said automobile stall-ways<sup>5</sup> being adapted to receive automobiles disposed in generally adjacent relation to each other and facing the stage<sup>1</sup>, and means for longitudinally tilting<sup>12</sup> the automobiles in said stall-ways<sup>5</sup> in order to produce a generally clear angle of vision<sup>6</sup> from the seat of the automobile through the windshield<sup>6</sup> thereof to the stage<sup>1</sup>, generally, free of obstruction from the automobiles ahead<sup>7</sup> of it.

**Appendix B** (continued)

15) An outdoor theater comprising a stage<sup>1</sup>, alternate<sup>2</sup> rows<sup>3</sup> of automobile drive-ways<sup>3</sup> and automobile stall-ways<sup>5</sup> arranged in front of the stage<sup>1</sup>, said automobile stall-ways<sup>5</sup> being adapted to receive automobiles disposed generally adjacent to each other, said automobile stall-ways<sup>5</sup> being vertically inclined<sup>4</sup> with respect to the horizontal, and successive stall-ways<sup>5</sup>, removed from the stage<sup>1</sup>, being successively higher<sup>13</sup>, and successive stall-ways<sup>5</sup>, removed from the stage<sup>1</sup>, being at successively lesser angles<sup>14</sup> with respect to the horizontal.

16) An outdoor theater comprising exhibiting means<sup>1</sup> and space for spectators in front thereof, inclined<sup>4</sup> means<sup>5</sup> for supporting automobiles in such space in rows<sup>5</sup> further and further from said exhibiting means<sup>1</sup>, the supporting means<sup>5</sup> in the rows<sup>5</sup> further and further away from the exhibiting means<sup>1</sup> being higher<sup>13</sup> and less inclined<sup>14</sup> successively to an extent as will produce a clear line of vision<sup>6</sup> from the seat of an automobile in a row<sup>5</sup>, through a windshield<sup>6</sup> thereof to the exhibiting means<sup>1</sup>, free of obstruction from the automobile ahead<sup>7</sup> of it, and an automobile drive-way<sup>3</sup> leading to and from said supporting means<sup>5</sup> of a row<sup>5</sup>.

19) An outdoor theater comprising exhibiting means<sup>1</sup> and space for spectators in front thereof, inclined<sup>4</sup> means<sup>5</sup> for supporting automobiles in such space in rows<sup>5</sup> further and further from said exhibiting means<sup>1</sup>, the supporting means<sup>5</sup> in the rows<sup>5</sup> further and further away from the exhibiting means<sup>1</sup> being higher<sup>13</sup> and less inclined<sup>14</sup> successively to an extent as will produce a clear line of vision<sup>6</sup> from the seat of an automobile in a row<sup>5</sup>, through a windshield<sup>6</sup> thereof to the exhibiting means<sup>1</sup>, free of obstruction from the automobile ahead<sup>7</sup> of it, and an automobile driveway<sup>3</sup> at the front and an automobile drive-way<sup>3</sup> at the back of automobile supporting means<sup>5</sup>.

